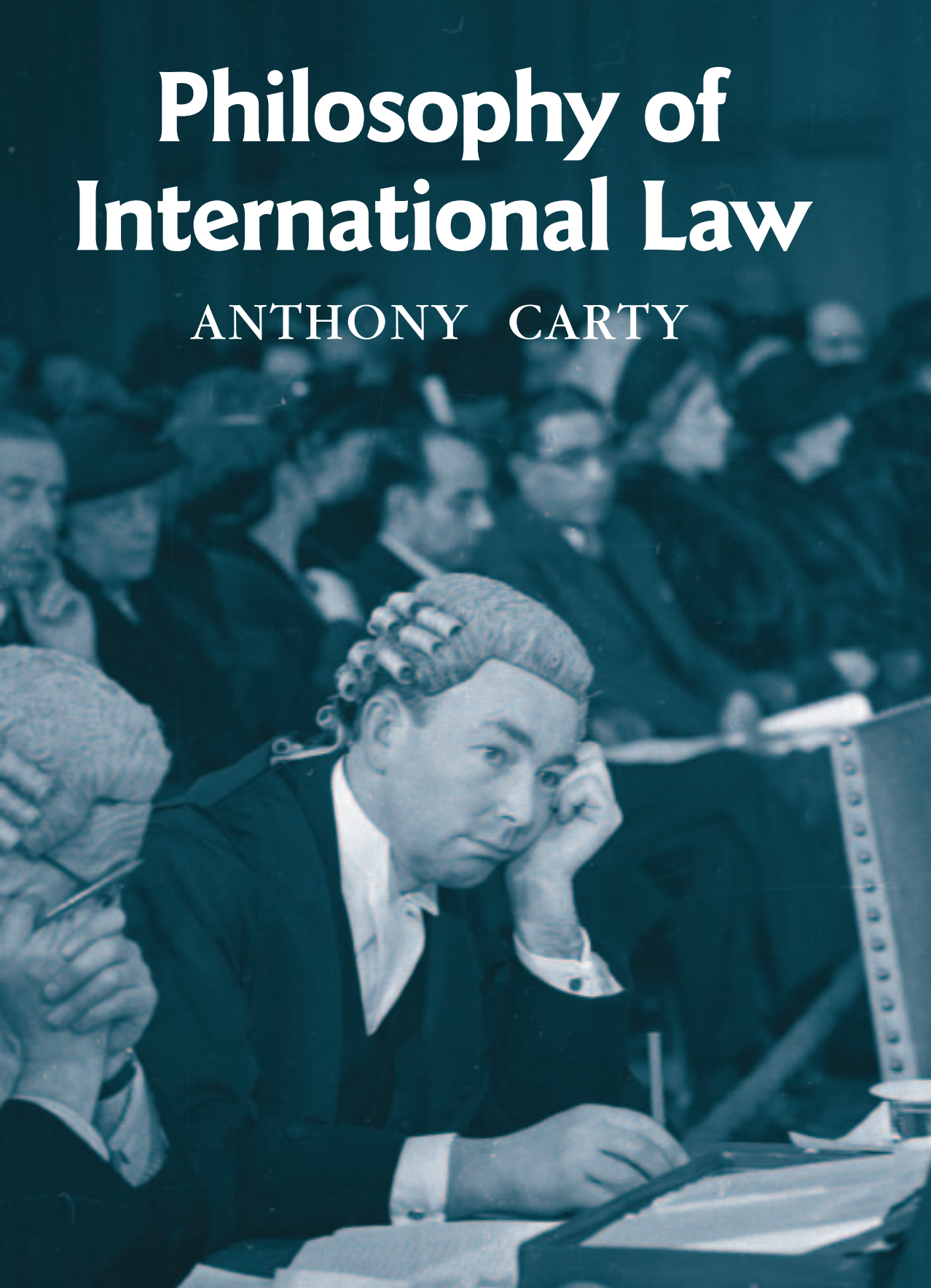
Philosophy of International Law

ANTHONY CARTY



PHILOSOPHY OF INTERNATIONAL LAW

To the Memory of my Parents

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Edinburgh University Press

Edinburgh University Press Ltd
22 George Square, Edinburgh

Typeset in Adobe Sabon
by Servis Filmsetting Ltd, Manchester, and
printed and bound in Great Britain by
Biddles Ltd, King's Lynn, Norfolk

A CIP record for this book is available from the British Library

ISBN 978 0 7486 2255 9 (hardback)

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PREFACE AND ACKNOWLEDGMENTS

Normally a preface will give a list of the names of friends who have taken the trouble to read drafts of the manuscript, but I have found myself spontaneously adopting a slightly different and, I believe, more rigorous course. In the final stages of writing, over the last two years or so, I have accepted offers to participate in workshops where I could attempt a dry run of my ideas. As a consequence the work has had considerable feedback, but a price of participation is that versions of parts of the work have been published or are being published.

This book is in a remote sense a sequel to *The Decay of International Law* published by Manchester University Press in 1986. It takes up some of the themes of the first book: the contested role of legal doctrine, the problematic character of custom as a source of law, and the relationship of the state to the nation in the theory of international legal personality. However, on this occasion attention is devoted less to a critique of international lawyers and more to a rethinking of the tasks an international lawyer might undertake. There is here a real effort to break free of what I regard as irrelevant categories of thinking, although this always carries with it the risk that the discipline no longer recognizes what one is doing and reacts rather forcefully – this is what I mean by feedback.

For instance, I presented the first fifteen pages of Chapter 1 of the present book at a conference of French and Spanish international lawyers at Palma, Majorca, in May 2005.[1] The somewhat outraged response to my views can be understood, at least in part, by the sense, especially marked among continental international lawyers, that they are legal technicians and should not be expected to assume a creative intellectual role, which implies political and moral responsibilities.[2] Indeed, the view of the international lawyer as a thinker or intellectual is regarded as subversive and even dangerous, no matter how innocuous his message, precisely because it does not find its way into a recognizable technical path.[3] And this is the reaction of quite close and sympathetic friends and colleagues, such as Pierre-Marie Dupuy

and Karel Wellens. The marriage of philosophy and international law, so evident to Vitoria, Suárez, Grotius, and Pufendorf, is now quite firmly not to be revived. It is even presumptuous to attempt it, a forgetting of the modest place that belongs to the international legal technician.

The *Decay of International Law* met with very supportive reviews from David Kennedy and Peter Goodrich, which may have led to my being identified as a critical legal theorist, given the immense authority of these figures in the critical canon. This is very honorable company. However, there are a number of important respects in which I am, for better or worse, distinguishable from the Critical School. For instance, there is a history behind Chapter 6 of the book, which was first presented as part of a colloquium in the Hague Residence of Leiden University in September 2003.[4] At this seminar, organized by Susan Marks and Miklos Redner, there was a passionate debate between my friend and colleague Martti Koskenniemi and me, about my antiquated ''60s Leftism,' which it is true postmodern critical legal scholars have mostly left behind.[5] Indeed the works of Foucault and Baudrillard are premised on the collapse of the Left after 1968. I very much sympathize with this fact.[6] However, I believe nothing has changed in the socio-economic conditions of the world, which justified the original reformist zeal of the Left, and this chapter is a passionate, if unfashionable manifesto against the abandonment of the wider socio-economic picture. It has a ''60s' anti-American tone, which is 'uncool,' a point to which I will return later.

A further 'uncool' aspect of my work, which is evident in Chapter 6, is my belief in the right to self-determination of small nations. Indeed, their right to form states is still the best chance they have to organize and protect themselves in the face of globalization – a thoroughly modernist idea. There is hardly a series of propositions that could be more unfashionable in postmodern critical legal circles. I have been struggling with the idea of the apparent priority of states over nations in international law discourse for many years and pieces of my argument in Chapters 3 and 7 have appeared before.[7] My approach is not at all influenced by the desire to accommodate liberal political theory, which I consider very briefly in Chapter 7. Instead, my aim here is merely to show the relative backwardness historically of the idea of the state in relation to the idea of the nation. The latter idea represents a democratic advance and epistemological progress. It is only the most deplorable stepmotherly meanness of the discipline of international law which leads it to set so many hurdles in the way

of the free expression of peoples. No new nation should have to explain itself to self-styled liberal opinion in the old Western European or North American nations, whether in its positivist or its postmodern mood.

Another 'uncool' feature will appear to be the book's 'anti-American' tone, especially in Chapter 5, 'American Legal Cultures . . .'. I think this chapter is a rather standard exercise in postmodern cultural critique, an immanent critique of American discourse, based almost entirely on quite conservative American sources, particular Protestant American theological writing and classical American historiography. However, when I presented substantially the same paper at an international seminar in Innsbruck, organized by Hans Koechler, some European reactions evidenced unease at possible scapegoating of one country.[8] For myself there is the question of accepting responsibility as an international lawyer to confront actual problems. The US has been until the present the leading country to accept responsibility for the maintenance of international order. Critical reflection on American practice has to be central to what an international lawyer does. In the appendix to Chapter 4, I consider the postmodern lethargy of Europe when it comes to accepting such responsibility, and one sees it again at the time of writing in the initial reluctance of Europeans to contribute effectively to peacekeeping in Lebanon in August 2006. This reluctance is now changing and it may be that the anemic mood in Europe is becoming a thing of the past. Koechler's forum in Innsbruck was in any case free of the Chekhovian quality of much continental European international law debate.

Nonetheless, there is one fundamental sense in which I think this work remains profoundly critical, indeed postmodern and that is my final insistence upon a plurality of methods for undertaking international law *as an intellectual task in which the only sovereign the jurist should recognize is his or her own intellectual conscience*. If statesmen want their treaties and judges want their decisions to be analyzed and expounded, they can hire their own officials to do it for them. Such exercises are useful, but they are no more than what I call legal dogmatics in Chapter 1 of the book. What still needs to be done is precisely to indulge one's search for the foundations of one's own legitimacy, which obviously cannot be found in the terms of Article 38(1)(d) of the Statute of the International Court of Justice. It merely allows that the views of distinguished jurists could be evidence of the existence of rules of international law. A renewed role for doctrine must at present lead the international lawyer in search of intellectual

tasks, which his colleagues will not recognize as legal. In that case the struggle is to see who can finally appropriate the title 'legal.' In my view there is much more to do than to provide analytical indexes of treaties and judicial decisions. I believe that in Chapters 7 and 8 I merely recall the wider role that doctrine had until Vattel. As I was finishing this book, I was approached by a young international relations scholar, Daniel Joyce, to make a contribution to a symposium on 'Fear and International Order.'[9] This appeared as a direct challenge from a student of international relations to test the most radical chapter of the book at the hands of anonymous peer reviewers from that discipline. The feedback was very favorable. I believe this experience is confirmation that the audience I am trying to address in the concluding two chapters has to be this wider one of quite simply humanist scholarship, not marked by any particular discipline.

In his contribution to *Law after Ground Zero*, Bill Bowring quotes at length from the *Decay of International Law*. However, he goes on to prefer the expression used by David Chandler, a political scientist, as the title of his own chapter, 'The Degradation of International Law?' International law is no longer accepted by Western powers as a curb on the use of force. They prefer to appeal to what they call international justice, leading thereby to the degradation, not the development, of international law.[10] There is a crisis of acceptance of international law, which is not confined to a few restless, 'postmodern' legal spirits, but belongs to the widespread refusal of any place for international law in world society. International lawyers have to address this society, which they cannot simply do through authoritarian appeals to their own legal dogmatics. They have to find a language, which others can speak. Indeed the point of the title of this book, *Philosophy of International Law*, is that they have to learn to use many languages.

While I have been completing this book, I have also been working on another, an analysis of the form of legal advising, which takes place in departments of the British government when it is making foreign policy decisions. The logic of such work is quite different from this book. It endeavors to be purely positivist historical research, as far as that is possible in the practice of history. However, underlying such work is the wish to set standards for international legal positivism which I think it does not set itself. International legal positivism, insofar as it is not merely an aesthetic experience for those adhering to it, is an ideology for the celebration of the freedom of states. It is not, in my view, a framework for the analysis of a social

reality. So I have not been able to resist the 'uncool' idea of including as annexes to Chapters 2 and 4 studies which I believe expose the true nature of arguments about general customary law and about the legitimacy of the use of force in international relations.[11] The influence of the legal concepts is not negligible. However, they are part of the traditional practices of the states manipulating them, which have to be understand in the wider context of the management of the international public space and the reproduction of suppressed or otherwise forgotten national, collective memories.

Notes

1 In *L'Influence des sources sur l'unité et la fragmentation du droit international*, ed. Rosario Huesa Vinaixa and Karel Wellens (2006) 239–49, reproduced with acknowledgment to Bruylant.
2 See in particular, Pierre-Marie Dupuy, in *L'Influence des sources*, ed. Huesa and Wellens, xviii, where he says doctrine should not indulge itself with questions of its own legitimacy, but get on with the technical task of making more intelligible the increasing complexity of positive law. Dupuy insists precisely that writers should confine themselves to the role of legal dogmatics, ignoring the much wider role of doctrine, which I have identified and indeed taken from a standard French dictionary of legal usage.
3 See further Karel Wellens, in *L'Influence des sources*, ed. Huesa and Wellens, 271, who insists that the vast majority of those present at the colloquium agree that the international lawyer functions necessarily within an existing international legal system. A small minority took the view that the jurist could afford to defend an anti-systemic phenomenology. This reference includes my friend and colleague Ignacio Forcada within the small minority of two.
4 Published a year later in the *Leiden Journal of International Law* 17, no. 2 (June 2004) 247–70, with acknowledgment to Cambridge University Press.
5 Perhaps Anthony Anghie is an exception. Consider his *Imperialism, Sovereignty and the Making of International Law* (2005).
6 Indeed I edited a book called *Post-Modern Law* in 1990 in which I apply Baudrillard's ideas sympathetically to a critique of public law and the state. I draw on these arguments in Chapter 7 of the present book.
7 In chapter 3, pp. 87–91 appeared in 'The System of International Law: The Right to Self-Determination, Minority Rights and Patters of Human Rights Violations – Connections with the Break-up or Implosion of States', in the *European Yearbook of Minority Issues*, 1 (2001/2) 67–70, with acknowledgments to Brill Publishers; and pp. 95–105, in

'Convergences and Divergences in International Law Traditions', *European Journal of International Law* (2000) extracts from 716–32, with acknowledgment to Oxford University Press. Chapter 7, pp. 203–10, 213–18 appeared in 'The National as a Meta-Concept of International Economic Law', in Asif Qureshi (ed.), *Perspectives in International Economic Law* (2002) extracts from 69–76, with acknowledgment to Kluwer Law International.

8 The chapter has been published in *The Use of Force in International Relations: Challenges to Collective Security*, ed. H. Koechler (2006).

9 Chapter 8 will appear in the *Cambridge Review of International Affairs* 19(2), with acknowledgment here to Taylor and Francis.

10 Bill Bowring, 'The Degradation of International Law,' in *Law after Ground Zero* ed. John Strawson (2002) 3, quoting David Chandler, *From Kosovo to Kabul, Human Rights and Humanitarian Intervention* (2002).

11 Appendix to Chapter 2, 'Distance and Contemporaneity in Exploring the Practice of States: The British Archives in Relation to the 1957 Oman and Muscat Incident,' *The Singapore Yearbook of International Law*, IX (2005), 75–85, with the permission of the Faculty of Law, Singapore National University; and appendix to Chapter 4, 'The UK Invasion of Iraq as a Recent United Kingdom "Contribution to International Law" ', in the *European Journal of International Law* 16 (2005), 143–51, with the permission of Oxford University Press.

1

WHAT PLACE FOR DOCTRINE IN A TIME OF FRAGMENTATION?

A Definition of Doctrine and its Present Problematic in Public International Law

I intend to begin simply by referring to two recent French works, the *Dictionnaire encyclopédique de théorie et de sociologie du droit* and a colloquium organized by the legal history department of the University of Picardie (Amiens), *La Doctrine juridique*. The first provides us with an authoritative and vital distinction between legal doctrine and legal dogmatics, while the second explains the problematic of keeping the former alive.

The French dictionary distinguishes doctrine from 'dogmatique juridique' (legal dogmatics). The former is defined as 'opinion, theory or thesis,' while the latter means the domain of the science of law concerned with the interpretation and systematization of juridical norms.[1] An essential element of doctrine is that it is supposed to have authority. The theory, opinion, etc. must be capable of exercising influence. Coming from the tradition of Roman law and canon law, particularly in French and German legal communities, doctrine has authority not as a source of law as such, but as freely and spontaneously held opinion, which is likely to become accepted. Since the seventeenth century the nature of this authority has become contested. It is seen as rooted in theories of *natural right* which were increasingly regarded as the ideological apparatus of a dominant bourgeois class.

Legal dogmatics works within the assumptions of legal positivism, particularly with respect to the sources of law. It is concerned with the interpretation of statutes and jurisprudence. There may be, within this framework, theories of interpretation and methods for the systematization of written and customary law. However, this supplementary role for the legal writer, whether an academic or practitioner, is not challenged one way or the other by the controversies surrounding doctrine. Theories of interpretation and systematization do

not have to operate only with logic, but any explicit reference to values will be confined to those which it can be argued are immanent to the system of legal norms actually accepted as legally binding in a society. This type of legal activity is an inevitable and integral part of any positive legal order, however narrowly understood.

The crisis facing doctrine, on the contrary, appears to be fatal. It is attributable above all to the collapse of the natural law or law of nature background to both continental civil law and international law which can be taken to have been completed in the West, especially Europe, by the 1950s, notwithstanding a brief renaissance of natural law after the Second World War. This tradition had allowed the jurist, since the glossators and canonists of the medieval period, to resort freely to notions of natural justice, equity, personal responsibility, public order, and harmony, etc., to develop freely otherwise fragmentary pieces of local custom, regional law, judicial precedents, and even general legislation.

In a sense the tradition was pre-democratic and pre-liberal, in that it is always assumed that somehow there will be present a group of erudite and morally serious people who are able to wrap up legally significant human actions in the texture or framework of reasonableness. It is also assumed that standards are universal and everywhere the same, not only in space but also in time. This favors an old-fashioned form of interdisciplinarity, which now appears as mere eclecticism. The doctrinal writer will look to history, philosophy, and even literature to support what appears to him just and reasonable in the circumstances.

It is, in the view of the Picardy study on *La Doctrine*, above all Kelsen with his Pure Theory of Law, who is easily recognizable as taking away the foundation for the working method of *doctrine*.[2] According to the Pure Theory of Law, theories of natural law or equity merely conceal the personal preferences of the authors and are subjective. Insofar as the structure of a legal order contains gaps and ambiguities, these can only be filled through political decision, in which the individual jurist has no special part to play. Liberal, voluntarist democracy means that, to find law, one has to return to the primary means which the legal order has agreed for the creation of new norms. In the Pure Theory of law these primary means do not have to be democratic, although Kelsen himself was a democrat. Given an increasingly regulatory function for law, in Kelsen's view, the details of social life to be so regulated would have to be dealt with by the appropriate public legal authority, whose success would be more or

less a matter of effectiveness. Deficiencies could be best remedied by giving authority to the judiciary, an extension of the state, or, as Kelsen preferred, the legal order, to take the necessary additional decisions. Allied to the Pure Theory of Law, as an enemy of the natural law schools, comes Scandinavian realism, which also serves to bury the traditional role of doctrine. Not only does this school attack natural law, etc. on epistemological grounds, but it uses the same weapons to attack the basic concepts of positive law which it sees as a legacy of the natural law tradition. These include the concepts of subjective or individual right, the will of the state or of the legislator. The Scandinavian realists would replace such activity with a form of legal sociology which entailed identifying law as a psychological datum, evidence of a sense of obligation in a society, that people felt themselves to be bound by rules which they regarded as law. Instead of the concept of validity, the lawyer should work with a theory of verification which allowed him to identify that there was a social belief that rules existed that were binding upon the people who held the belief.[3]

Given the present structure of international law, which is still primarily customary, this gives a full place to writers, but only within a framework of legal dogmatics.

The Classical Place of Doctrine in International Law

The aim of this introduction of the figure of Paulus Vladimiri will be to illustrate how, during the classical medieval period, the distinction between doctrine and dogmatics was clearly understood precisely in the sense outlined in the *Dictionnaire* discussed in the first section. It is only with the coming of the modern period that the former comes to be swallowed up by the latter.

Vladimiri and the 'higher' medieval period

Vladimiri was anxious to carve out a proper space for judicial practice against the hegemonic claims of doctrine in medieval legal disputations. At the same time his doctrinal method, that is the types of material upon which he relied to develop his argument, shows clearly how this method rested upon certain epistemological assumptions which have not been regarded as valid since the classical period. It mattered enormously to Vladimiri, involved in a dispute with the German (Teutonic) Order on behalf of the Polish king, to argue that the proper resolution of the conflict had to be through a judicial

process and not merely a reliance upon doctrine. To demonstrate this he made a clear distinction between the two, which remains valid in a legal culture where it is the claims of judicial practice which are hegemonic. To leave disputations about heresy or the rights of infidels against Christians in the hands of doctrinalists is very dangerous because the nature of doctrine or of science is that it excludes all doubt, and therefore does not accept proof to the contrary, since it is from propositions, which are known by themselves.[4] Whether a war against a heretic or infidel is just and can therefore be undertaken involves questions of evidence as well as of doctrine. Whether in a particular case there is a legitimate cause of attacking, and hence an illegitimacy in resisting, are questions which cannot be answered 'except by way of justice, namely by proof brought in law or by sentence and in consequence by a legitimate declaration . . .'[5]

Vladimiri's method receives a very lucid analysis from Stanislaus Belch. Here I wish to highlight the place which is nonetheless left to doctrine as against judicial practice. For instance, confusion about what may be done by Christians to infidels arises from a factually incorrect assumption that all infidels commit blasphemy, persecute Christians, and seize their territories. Factually inaccurate assumptions lead to pseudo-doctrinal justifications of what can be done to infidels. Where none of this has been proved, the question arises, which doctrine can appropriately answer, what can be done to infidels as such? The answer comes from natural law: they are entitled to be left in peace. It is the nature of the Christian faith that it is grounded in love. Therefore, nothing coercive can be done in its name.[6]

The correct question for doctrinal debate was whether 'the infidel nations have the same human rights as the Christians.' To answer this question meant the establishment of the truth of certain principles which alone could serve in any argument as a major premise.[7] This involved Vladimiri in sifting through the opinions of the great doctors of the Church, some of whom did not share this doctrine on the rights of infidel nations. He applied a quite simple style of reasoning to reach his goal. For instance, there was scriptural support (c.3, D 45) concerning directly the prohibition of force in the conversion of the Jews. There, the essence of this canon is that it applies equally to the conversion of all infidels. Again, to take another example, Vladimiri's opponent Vrebach takes Paul's admonition that Christians should not fight infidels to mean not those who recognize the dominion of the Church and the empire. Vladimiri objects that in law we do not usually make distinctions, and so we should not here.[8]

The renaissance universality of resemblances

The justification for this rather extensive treatment of a medieval figure is that it is now widely accepted in the scholarship that modern figures which might compete for the 'fatherhood' of international law, above all Vitoria and Grotius, belong firmly within this medieval world. Haggenmacher emphasizes the pre-modernity of Grotius. That is, Grotius's work, which is mainly about the doctrine of just war, is the culmination of a medieval scholastic tradition, which depended upon a medieval and classical Greek concept of natural law. The main feature of this doctrine is that *Man* is embedded in a universal society and in the *Cosmos*.[9] Equally, Vitoria, who was concerned with the same question as Vladimiri, approached it against the backdrop of a presumed universal order. As Bartelson puts it, 'The question was not how to solve a conflict between competing sovereigns over the foundation of a legal order, but how to relate concentric circles of *resemblant* laws, ranging from divine law down to natural and positive law. In his effort to work out a coherent relationship between them, Vitoria relies on a lexicon of legal exempla, in which a wide variety of textual authorities are invoked.'[10]

The transition from the medieval to what Bartelson calls the classical period, from the seventeenth century at the latest, already disturbed the place of doctrine, if not among international lawyers, then certainly among serious students of international society. Bartelson provides a very illuminating account of the epistemological foundations of the transformation. The essence of this perspective is, of course, a retrospective reflexivity. (thanks to a neo-platonic revival). Renaissance knowledge became a knowledge of resemblances between entities whose unity had been shattered. Bartelson sums up what is, in effect, the method of Grotius in the following phrases: 'Through the resemblance of events and episodes it becomes possible to describe and discuss present affairs by drawing on the almost infinite corpus of political learning recovered from antiquity, without distinguishing between legend and document';[11] it becomes possible to describe the deeds of a Moses or a King Utopus in the same terms as one describes 'the recent behaviour of Cesare Borgia or Henry VIII, because it is assumed that they share the same reality, and occupy the same space of possible political experience.'[12] It is inevitable that such a conception of legal order will be, in the modern sense, monist. Neither Vitoria nor Grotius will countenance any opposition between the kind of law that applies

between states and within states, since this would imply an absence of law.[13]

THE SOVEREIGN: OR THE OBJECTIVITY OF SUBJECTIVE INTEREST

The epistemological break with the medieval–Renaissance picture supposes a combination of political and philosophical events. The so-called modern state arising out of the wars of religion of the sixteenth and seventeenth centuries is taken as traumatized by its bloody foundation and hence silent about its origins. It becomes the subject of Descartes' distinction between the immaterial subject and the material reality which it observes, classifies, and analyses. Knowledge presupposes a subject, and this subject, for international relations, is the Hobbesean sovereign who is not named, but names, not observed, but observes, a mystery for whom everything must be transparent. The problem of knowledge is that of security, which is attained through rational control and analysis. Self-understanding is limited to an analysis of the extent of power of the sovereign, measured geopolitically. Other sovereigns are not unknown 'others' in the modern anthropological sense, but simply 'enemies,' opponents, with conflicting interests, whose behavior can and should be calculated.

The purpose of knowledge, once again, is not to re-establish resemblances in a fragmenting medieval Christian world, but to furnish dependable information with which to buttress the sovereign state, whose security rests precisely upon the success with which it has banished disorder from within its boundaries onto the international plane. Mutual recognition by sovereigns does not imply acceptance of a common international order, but merely a limited measure of mutual construction of identity resting upon an awareness of sameness, an analytical recognition of factual, territorial separation, combined with a mutual accord of reputation, which, so long as it lasts, serves to guarantee some measure of security.

However, the primary definition of state interest is not a search for resemblances, affinities of religion, or dynastic family. Instead, it is a matter of knowing how to conduct one's own affairs, while hindering those of others. Interest is a concept resting upon detachment and separation. Society is composed of a collection of primary, unknowable, self-defining subjects, whose powers of detached, analytical, empirical observation take absolute precedence over any place for knowledge based on passion or empathy, whether oriented towards sameness or difference.[14]

The Role for Doctrine in the Classical Theory of Sovereignty

This structure of sovereign relations remains the basic problematic, which international lawyers face today. The origin of the state is a question of fact rather than one of law. One may not inquire into its composition or nature. Law is whatever the sovereigns choose to define as such through their will, in treaties or customs as implied treaties. The instability of this supposed legal order is patent. The status of mutual recognition as a means of assuring security is unstable. There is no agreement about the legal significance of recognition. International law is binding but not enforceable. Adjudication exists, but its impact is sporadic. Fundamentally, the problem can be encapsulated in a sentence. There is what all the parties are willing to identify as law, but there is auto-interpretation of the extent of obligation.

Given the preponderance of the state, the role for doctrine has become marginalized and confined to the question whether international law is law at all. Perhaps the majority view among the profession is that the question is unnecessary. Emer de Vattel made the point that international law is a law precisely suited to the nature of the state, as a form of independent corporation. Institutional defects in the character of international law, viz. the absence of legislature, judicature, etc., do not affect the basic need for and suitability of inter-state law for law among states. So Jouannet sees no difficulty in the Vattelian sovereign being integrated into an international legal order. The lack of difficulty is hardly surprising because this new legal order is made by states specifically for their relations with one another. The crucial feature of her argument is that the character of the sovereign is corporate. Because sovereign nations deal only directly with one another, they can only see one another as societies of men of whom all the interests are held in common. It is not a law of nations derived from human nature which rules them, but a law derived from the particular character of the state.[15]

The difficulty remains, accepted by Bartelson and Jouannet, that there is no superior juridical order immediately binding upon states. They agree that sovereignty includes the right to decide the extent of an obligation. Again, both may quote Vattel 'each has the right to decide in its conscience what it must do to fulfil its duties; the effect of this is to produce before the world at least, a perfect equality of rights among Nations . . .'[16]

Jouannet describes Vattel as introducing the logic of Hobbesean and Lockean individualism into international law, liberty, and

sovereignty which are not unlimited but not subject to any higher order. Bartelson would rather describe this order as the objectivity of subjective interest.

This dilemma is what is meant by the question whether international law is binding. It troubled doctrine in international law as long as a natural law or Law of Nature tradition continued to have any life in it, thereby posing the question whether norms or values could have objective character. It was a main preoccupation of international law doctrine in the nineteenth and early twentieth centuries, encapsulated in debates about whether (a) international law was binding, (b) whether treaties were legal instruments which had to be kept, and (c) whether the sovereignty of states could be legally limited or restricted.

When the traditions of natural law, even of a Vattelian character, evaporated after 1945, there seemed to be nothing left but a legal pragmatism, until the so-called critical legal debate resurrected the issues. The critical legal debate, particularly associated with Kennedy and Koskenniemi, appears to resurrect the role for doctrine at least in the narrow and marginal sense described here. They agonize about the paradox of the need for an international order if equally sovereign states are to have any peace with one another. At the same time they recognize that an objective international order, one that is binding upon its subjects albeit not created by them, is incompatible with the structure of state sovereignty, taken from Vattel, which they do not dispute.[17] This debate now takes upon itself a post-epistemological turn insofar as the parties debate through rhetorical devices which are neo-positivist and neo-naturalist, in that they do not willingly espouse the foundations of either school, even if they continue to contrast the language of the two schools.

In my view, the critical legal approach is useful as a heuristic device for exposing the failure of practitioners to ground appeals to rules of law in *actual*, rather than supposed, evidence of state consent, or in *actual*, rather than concealed or disguised, reference to objective values. However, its 'postmodernism' (its opposition to the idea of any fundamental or absolute values) does not allow it to resurrect any creative role for doctrine, even less so Vladimiri's. Their own sharing of liberal value skepticism leaves critical legal studies with no more than repetitive demonstrations that international law decisions (whether of courts or of states) are precisely that – decisions – so that international lawyers must accept responsibility for the political character of their decisions, in the sense that they are free, undetermined by prior legal

rules. Indeed, debate with critical theorists has revealed that there is a partiality for the authority of the state that precludes any return to naturalism or any possible contemporary equivalent. For instance, this may be seen in a discussion between Allott and Koskenniemi on this point.[18] I will juxtapose their positions from quotations of their work. According to Allott, international law does not recognize the total social process by which reality is formed, but only that of the interacting of the governments of state societies, as if they constituted a self-contained and self-caused social process. This is precisely the sense of epistemological positivism which Bartelson has focused on in Descartes and Hobbes. Koskenniemi objects that statehood functions precisely as that decision-making process which, by its very formality, operates as a safeguard that different (theological) ideals are not transformed into a globally enforced tyranny.[19] It is obvious that Koskenniemi imposes upon existing state structures the liberal idea of a political order as arbitrator. However, he nowhere demonstrates that states function internationally in this way, even those that suppose themselves to be liberal. Indeed, Tasioulas points out how Koskenniemi's further response to this encounter leads to the odd conclusion that there is a 'tendency of some of these recent trends to yield conclusions surprisingly congruent with Weil's positivist stance . . . '[20] So, the problem posed by the classical doctrine of sovereignty remains, only now it seems that international lawyers, in a 'postmodern' epoch, are bereft of any tools with which to complement or, alternatively, deconstruct the state. This is the sense in which I pose the question whether there is any future for doctrine in a world beyond positivism, namely beyond the exclusive role of states as law-definers?

And Meanwhile, in England?

I have argued that: 'the theory of international law was deliberately 'killed off' by the 'greats' of the discipline in the 1920s and 1930s, in particular by Oppenheim, McNair, Brierly, and even Lauterpacht. It was they who laid the intellectual foundations for the so-called practitioners' approach to the discipline, and then sent their successors off into the courtrooms'.[21]This statement risks a number of ambiguities, the first of which has to do with the word 'theory.' This has come to mean the rather abstruse application of French poststructuralism to legal formalism, leaving much of the profession baffled, even intimidated, but hardly convinced that a connection had been made with their concerns.[22] Obviously, the argument that theory has died out in

England, as everywhere else, needs to be restated in several essential elements.

First, the expression theory should be understood to mean the symbolic, or cultural, ethical significance of the body or system of international law in ordering the relations among states. This disappeared in Britain with the shock of the First World War and the rush to institutions to defend humanity against the sovereignty of states. No more eloquent statement of this view has been made than by Thomas Baty:

> The difference between the 19th century and the present becomes vividly apparent if one peruses such a book as Sir R. Phillimore's *Commentaries on International Law*, written in the 1850s. Grandiloquent, discursive, ill-balanced, inconclusive as it often is, one feels as one reads its pages the pervasive presence of a conclusive standard of right and wrong. No such moral standard permeates the works of today.[23]

Whether one esteems such figures as Phillimore as thinkers or intellectuals (and clearly Baty did not), they considered themselves as international lawyers as having a responsibility to address statesmen about how the rule of law should prevail in international society. This had nothing to do with being university teachers, because their primary audience was not the university student. Nor does it help to describe them as 'practitioners' without defining what they practiced. The word is as slippery as 'theory.' For instance, Crawford describes Phillimore as an English-educated civilian. His three-volume international law text 'was written by a civilian practitioner and later judge of the Admiralty Court.'[24]

Phillimore's concept of law rested upon an appeal to the spirit of a God-given moral law governing the universe.[25] So, 'Obedience to the law is as necessary for the liberty of States as it is for the liberty of individuals.' Moral truth demonstrates that independent communities are free moral agents, and historical fact demonstrates that they are mutually recognized in the universal community of which they are members. Law is not to be equated with the notion of physical sanction. Instead, one has to judge critically the impact of historical events upon states as free moral persons. So Phillimore's view, writing in 1879, was that European history since the Danish War of 1864 had been very critical. In 1864 there was a violent change of territory and states did not come to assist as they ought to have done. There followed further injuries which states did not assist others to prevent. So in the 1870s we find that Europe is subject to the prevailing notion that 'a state must seek territorial aggrandizement as a condition of her

welfare and security.' There may have been little 'theory' underlying these remarks, but clearly he was addressing them to his political leaders, at least one of whom, his friend William Gladstone, might have been expected to have some sympathy. While it is mentioned that he was a judge of Admiralty, he was also a member of the House of Commons in the 1850s when he wrote the first edition of his textbook. An essay by Gladstone may illustrate how a leading Victorian politician understood law and morality in relations among states. 'England's Mission' gave a central place to the equality of independent states. To Gladstone, an immoral policy is a 'vigorous' policy, which excites the public mind, apathetic with the humdrum detail of legislation, thereby covering up domestic shortcomings; it disguises partisan interests as national and enlists jingoist support. The self-love and pride, which all condemn in individuals, damage states as well, destroying their sobriety in the estimation of human affairs, as they vacillate from arrogance to womanish fears:

> The doctrines of national self-restraint, of the equal obligations of States to public law, and of their equal rights to fair construction as to words and deeds, have (however) been left to unofficial persons . . . [T]o overlook the proportion between our resources and our obligations, and above all to claim anything more than equality of rights in the moral and political intercourse of the world, is not the way to make England great, but to make it both morally and materially little.[26]

Phillimore's association with Gladstone was hardly exceptional. In his survey of the English tradition of international law Johnson quotes F. E. Smith (later the Earl of Birkenhead) referring to it as an English tradition that 'Professors of International Law shall also be men of affairs.'[27]

There is no mistaking McNair's unease with this intellectual atmosphere. He remarks how the nineteenth-century textbook was a descriptive rather than an analytical work, a history of international relations.[28] Now the output of judicial decisions makes international law 'comparable in technique and educational value to the common law or equity.' The topics one can now consider in teaching international law are much more often dealt with in the national courts, the conclusion being permitted that such law is part of a barrister's training. These topics are: recognition of belligerency, effects of insurgency and civil war, immunities of foreign states and public ships, diplomatic and sovereign immunities, territorial waters and jurisdiction on the high seas, nationality, treatment of aliens, effects of war, etc.

Jennings began his tenure of the Whewell Chair in Cambridge with a ringing endorsement of McNair's sentiments. He emphasizes the importance of judicial, primarily municipal, decisions which are found in the *International Law Reports:*'It is impossible to exaggerate the importance of this publication which has transformed international law into a case law subject, thus making it not only a better teaching material, but also a very much stronger and more useful law.'[29]

When McNair and Lauterpacht were presenting the first volume of what was then called the *Annual Digest of International Law Cases* in 1929 their expectation was that: 'The feature of the twentieth century, particularly after the year 1919, is likely to be an abundant growth of judicial activity in international relations, and there is little reason to doubt that, before half that century has elapsed, international law will be developed almost out of recognition.'[30] Concerning the authority of such material, the authors clearly have reference to the fruitfulness of the judicial style of reasoning, that is the concern with the resolution of a specific problem. So the authors continue 'in any field of human activity it is impossible for one mind faced with the task of solving a problem not to give weight to the solution of a similar problem which has commended itself to another mind elsewhere. That is not a principle of law but of common human experience.'[31]

This is not necessarily 'ignoring state practice in favor of judicial decisions, or the analysis of ideas in favor of textual exegesis,' [32] but it is to create the expectation that the best synthesis of this practice, and indeed the most authoritative interpretation of this practice, will be provided by the judiciary, whether national or international.

Elsewhere I have recently argued that it is a focus on the prospect of adjudication that heightens the concern of the positivist international lawyer, with the bilateral or reciprocal aspects of legal relationships at the expense of the wider aspects for international order which concerned Phillimore or Birkenhead. The problems of state power and sovereignty, and the exigencies attaching to the nature of an international legal system and its legal structure, are unlikely to be central to the concerns of a consensus-based judiciary, which still resembles permanent arbitration. The tendency will be to rely upon areas of state practice that are fairly well settled and have implications for the individual, for example, for the purposes of extradition law, which state may be taken to have effective jurisdiction. A casuistry of the equity of the particular case is combined with the necessity of having regard to the seesaw of recognition and acquiescence with

respect to the two most engaged parties, for example with respect to title to territory, in what will usually become a concrete context of arbitration.[33]

What is lost thereby is the confidence to address directly the behavior of states in terms of some independent international standard. This had disappeared with the Victorian and Edwardian confidence in the capacity of international lawyers as opinion-makers to sway the conscience of nations. When exactly this happened is disputed and may vary from country to country,[34] but the gradual process of technical transformation of the discipline of international law has taken place everywhere, and in Britain that form has accentuated the place of the judiciary. In the nineteenth century, the confidence of English international lawyers to influence state behavior rested on a utilitarian sense of the power of international opinion to sway state behavior to a social sense of what was in the interest of the majority. It supposedly reproduced the role of opinion in shaping legislation in England itself. Here key figures were the professors of international law in universities such as Oxford (T. E. Holland) and Cambridge (John Westlake).[35]

The alternative, post-1918 view in England was instead institutional, one in which the international lawyer had no distinctive role as an opinion-shaper. Brierly represented it well in his study of the foundations of international law. As with Oppenheim,[36] Brierly saw the state as a complex institutional labyrinth. He took a view which effectively excluded any place for an evolving international public opinion, or even an evolving customary practice of states. He had the following perspective on the relation of opinion to law creation:

> 'the public' which is supposed to direct political events in a democratic state is a 'phantom'; there is no overmastering social purpose in it, but a vast complex of individual purposes . . . Somehow or other we know that out of these chaotic materials there are precipitated the public policies . . . which the organs of government proceed to carry into effect in legislation or administration, but the process by which this takes place is far too intricate either to be traced in detail or to be summarized in a single formula.[37]

The sequel to this development appears to be very unfortunate in the case of England. Commenting on the English scene in the early 1960s in his inaugural lecture at the London School of Economics, Johnson provides a remarkable panorama of the richness of the classical English international law tradition. It cannot be reduced to the role of nineteenth-century utilitarianism and the manipulation or

legitimate shaping of public opinion. It goes back to a rich medieval and Renaissance civilian, Roman law, and natural law tradition, alongside the important prize law field, protected by the ancient universities and having so prominent a place even into the nineteenth century.[38] However, at the time of writing Johnson noticed the serious gulf in England, wider than elsewhere, between the study of international law and the study of ethics. Johnson blames this not on John Austin, who did not oppose international law as form of international morality, but on the international lawyers themselves, who wished to make their subject appeal to their fellow law school colleagues. This led English international lawyers, wishing to impress their colleagues with the positive character of international law,

> to go too far in severing the links which connected international law with the principles of morality and natural law. International law may by this presentation have been made respectable to practicing lawyers, although, as we have seen, even that result was only very partially achieved. The price paid was that international law came to have, and still has, very little meaning to that substantial portion of English public opinion which tends to view world events in moral terms. What relevance has international law today to those people, and especially young people, who feel passionately about such questions as the hydrogen bomb and race relations? Unfortunately very little.[39]

FOUNDATIONS FOR A NEW ROLE FOR DOCTRINE

The difficulty for the very idea of international legal order remains its seriously inchoate institutional character and that international law ideas held nationally are embedded or even encrusted in prejudices and emotions tied up with the national history and identity of a particular country and its favored international associations, viz. special relationships.[40] Any indepth exploration can only show that, however lucid individual politicians and lawyers may think they are, structural anthropology is correct that their language and thought patterns will be embedded so deeply in their ethnic-cultural context that arguments about truth/falsity, honesty/deception will be impossible to unravel. One is, as an accidentally external, cultural legal critical voice, up against such a density and stubbornness of opinions and convictions that it appears impossible to move forward with rational argument. Yet the internal dynamic of the argument within Britain today – with the continuing Iraq crisis – shows that the dialectic of intersubjective confrontation does at least keep controversy moving, although only

within the national boundaries. This is occurring because of internal divisions within the governing elites of the country, which breaks down the wall of silence of the otherwise secret state. Still the disaffected within the governing groups believe they can appeal to a wider interested public through the media.[41] External criticism remains irrelevant and unnoticed. This internal debate does, as Ricoeur would expect, take on a personalist language of individual accountability and responsibility, in which doctrine, viz. the struggle of individual, relatively independent academic international lawyers, has a part to play. They try to call both political leaders and government lawyers to account by appeal to international standards.

Exactly what role an academic might play in this context can perhaps be illustrated by the response of one academic international lawyer to the behavior of the Attorney General. Professor Colin Warbrick of Durham University is reported as making an intervention in *The Guardian* (March 25, 2005) upon publication of Elisabeth Wilmhurst's letter of resignation from the Foreign Office. This letter showed that the Attorney General changed his mind between giving his legal advice of March 7, 2003 and his brief statement to Parliament ten days later. Warbrick calls for his resignation as Attorney General for failing in his constitutional duty to give his own legal opinion about the proposed war. By this Warbrick means the Legal Officer allowed himself to be led by others. However, more disturbing is Warbrick's observation that Blair and his colleagues are likely to remain immune from prosecution for the crime of aggression before the International Criminal Court because the parties which have signed up to the Court are still trying to work out a definition of the crime.

It is the inevitably inchoate institutional background of international law which assures the continued role for doctrine in international law. Behind the inchoate nature of international legal order lies the perpetual threat of unilateralist action by states. It is merely the counterpart of a relative lack of international institutional authority. The only certain legal response to this deficiency, however weak, remains doctrine. Yet doctrine is itself weaker than ever in its foundations. It rests on little more than the intersubjective dialectic which can challenge the prejudices of individuals who claim an individual sovereignty for the meaning of the language they use, however comically they may be enmeshed in prejudices which only a most elaborate anthropological and phenomenological analysis can unravel. Once again, it has to be said that doctrine cannot become

authoritative judgment in the sense of the distinction made by Vladimiri. As for a positive outcome it can only come, if at all, from live and personal dialectical engagement. Learned writing has to be accompanied by physical confrontation before there is any prospect of psychological movement. It is conceivable that the individual scholar can reconstruct the entire process from within himself, but this is most unlikely. Nonetheless there are also very positive features of the present intellectual climate that favor the development of doctrine. There has been a sea-change of an epistemological nature in the understanding of the state that the burden of the classical period still appears to impose upon doctrine. In the classical epoch law, as also any other significant political meaning/symbol, was defined by the detached, mysterious sovereign (of Descartes and Hobbes) in an exclusive, authoritative fashion. Now it is recognized, following Bartelson's stress on the early nineteenth-century revolution of language, that the exercise of naming – of which legal naming, the acceptance of obligation, is merely a part – is directly related to language and the history of the nation. It is no longer a matter that mysterious sovereigns, remote and separate from society, can determine meanings by legal fiat, by using words to reflect their exclusive monopoly of physical power and the capacity to coerce. Instead, man himself emerges as the sovereign creator of his representations and his concepts. Words are not there, as with Descartes, to represent passively, as if mirroring, something external to the subject. It is the activity of the subject itself which creates its own world of experience and gives words to it. Language reflects the experience of an individual, but also of the tradition of a collective political being. Therefore, language becomes subject to interpretation. Language in its dense reality is able to tell us the history of the institutions signified by the words. The world of institutions is made by men and therefore can be reached as a mode of self-knowledge.[42] The agenda of this escape of meaning from the sovereign state at the international level is something of which international lawyers have been conscious for a long time, even if they cannot give the change a clear theoretical focus.

So I will elaborate once again the implications of Bartelson's distinction between the language of state security and the situation, which followed the early nineteenth-century revolution in language, *after which we all become responsible ourselves for the meaning of the language we use*. What is being argued for here is not an absolute sweeping away of the very limited place which exists for arguments that suppose a quasi-federal international system in which an

increasing range of hierarchically ordered tribunals may have the opportunity to test the jurisdictional competences of states, as entities incorporated under an international legal structure. This limited field may exist, if rules in the area of environment, economic transactions and even the use of force were to become relatively settled and the practice of their adjudication relatively regular and enforceable.

Nonetheless the urgent importance of a more penetrating concept of international society, as a responsible network of individuals interacting in a web of international interpersonal relations, may be illustrated by the current crisis of the British state, in the period since the beginning of the Iraq War in 2003, precisely in the hallowed traditional area of state security. Here the corporate character of the state, and hence the scope that exists for juridical analysis, should have been able to rest upon the absolute secrecy of its internal operations. The jurist would have to deal only with 'authorized' or 'validated' acts or pronouncements of the state. And yet in early twenty-first-century globalized, democratic, but above all media-dominated international society, the internal workings of the British state and its relations with its American ally allow easily and call for phenomenological ethnography of its individual participants. Indeed, to borrow some 'progressive' classical international law language,[43] the individual has, with a vengeance, become the only real subject of international law, which provides enough material activity to give doctrine scope to reach all the essential parameters of the field. This is not simply because the corporate character of the state dissolves into a natural person in a state of nature as it confronts other states across an international state of nature.[44] It is also because, in a radically democratized and educated European and American society, the notion of the individual as absolutely subject to a sovereign ruler dissolves into a willingness to serve and to cooperate, which is equally absolutely conditional upon the reasonable behavior of one's masters.

So the way is open for us to return to the morality of princes and personal rulers familiar to the pre-Vattelian epoch of international law doctrine, in which there was full scope for the medieval and classical Roman concept of law as a standard of right reason, of behavior judged appropriate in the circumstances *as applied to natural persons*. What is suggested here can only be, in this preliminary, introductory outline, the bare bones of an ethnographic phenomenology of human conduct, whereby the place of language as an all-determining structure is accepted up to the point that out of minute instances of surface consciousness, general social perspectives can be

read. The Ricoeur-based phenomenology espoused in the later stages of this book is ultimately personalist and assumes that the individual can become aware of and freed from the structures of consciousness that language imposes upon him.[45] The individual can then be held accountable. This is not to conflate the distinction between doctrine and authoritative judgment that Vladimiri thought so important. Doctrine cannot finally judge human behavior. It can merely explain it and offer to challenge its contradictions, calling upon participants engaged in contested actions, to explain themselves.

I have already suggested that the lawyer needs to equip himself with the tools of ethnography and cultural anthropology if he is to understand the issues which arise in the context of contemporary international controversies.[46] This is because we are all embedded in national, linguistic, historical communities. From these we scarcely ever emerge, especially if we are English-speaking. Since conflicts usually occur across national boundaries, our task is to try to unravel differences of which we are hardly even aware, precisely because they are so profound.

The methodology of the Écoles des Annales, in particular their history of Mentalities, could be useful for sharpening an understanding of how a particular historical community approaches the question of legal obligation.[47] Taking a case study of the biographical evolution of Hans Kelsen and Carl Schmitt in Germany and Austria in the 1920s and the 1930s, a phenomenology of individual, as well as group, human consciousnesses is the most personal and humane way of understanding people's sense of obligation and outrage in the matter of conflict. This historical approach to mentalities is an integral part of an approach to international law, which claims that the idea of the state in international law should be understood simply as the institutional or procedural framework which cultural, historical communities give themselves for the conduct of their public affairs.[48]

THE STRUCTURE OF THIS BOOK

What follows in the next three chapters, on the sources of international law, international legal personality, and the law relating to the use of force, may well appear to show some familiarity with the usual topics of a general course on international law. However, their aim is to introduce the problems of fragmentation of statist language for the very heart of the daily labor of the international lawyer. In this

way a case will be made for *philosophizing international law*. This should mean, recognizing the inherence of an anthropology in the legal discourse of international lawyers, which needs to be brought fully to life *and made to run*. One needs to explore how the language of sources as used by an as august a body as the International Court of Justice, fails to express the reality of the forms of legal consciousness in contemporary international society. The chapter on sources does not offer a theory of justiciability, nor does it attempt a sociological critique of the professional limitations of the judges, although both are implicit in the critique of the Court's reasoning. Instead, the aim is merely to show that the statist language with which the Court works is unable to grasp the processes of international life. It will be implicit in the critique that the reason lies in the Court's continued adherence to the security-oriented language of the classical state sovereign of early modernity. Hobbes is in the shadows. The chapter concludes by setting out possible minimum conditions for an effective observation of the practice of states as institutions and the place of lawyers within them, by invoking the idea of a public space, within and outside the state in which legal argument can take place. As an appendix, a history is outlined of a concrete study of the debates about legality within a state, about an issue of intervention, and how this actually played out to the wider public space.

The next chapter addresses this question more directly by exploring international legal discourse, again largely judicial, on legal personality, particularly the dialectic between territorial sovereignty and the right of peoples to self-determination. These clashes reproduce the very basic conflict between the classical and the romantic concepts of meaning outlined by Bartelson. Indeed, the phenomenology of subjective, individual meaning, which is opened up by the language of self-determination, albeit itself historically restricted to the claims of nationalism, begins to provide a way into a phenomenology of international relations. At the same time, it is recognized that the language of the state, as the mechanism for identifying legally significant customary law practice, still produces a circular reaffirmation of territorial integrity and precludes change. Indeed, the concern of the positive, international legal system with order means, historically, that it has no legal theory of personality, but merely addresses tasks to entities which precede it. There follows a doctrinal study of the implications of the classical and romantic interpretations of personality for the state and nation as competing subjects of international law, to show the impasse between the two

paradigms of personality, which have still to be superseded. In the later chapters, especially the last, an attempt will be offered to surmount the dichotomy.

Next, the chapter on the use of force leads into the philosophical argument that the struggle for humans to find meaning has to take priority over the struggle to build institutions. It will offer to make most explicit the raw spirit of Hobbes that underlies the whole attempt to construct an international legal order on the basis of the early modern classical state sovereignty. A close analysis will be given of the most penetrating and systematic critique of the problem that the classical state posed for international law, which Kelsen offered after the First World War. The main lesson here is that this most rigorous thinker did not consider the positive law put in place by the UN Charter met his standards for overcoming the dilemmas posed by the classical state. The chapter concludes by drawing upon the work of Richard Tuck to show that the radical individualism associated with Hobbes, whom Tuck brings together with Grotius, Vattel, and Kant, is integral to a predatory imperialism towards the non-European world. The chapter has an appendix, which is intended to offer a clear illustration of the role which doctrines of pre-emption and radically defined concerns of the security state now play out in relations with the so-called non-Western world.

The following three chapters take up directly the philosophical issues, which have been permeating through the familiar enough international legal discourse up to now. Inevitably the argument will increasingly subordinate the supposedly legal materials – the remnants of a fragmented statist discourse – in relation to the various tools of history, poststructuralist cultural theory, geopolitical theory, etc., in order to reach an analytically rigorous understanding of present contemporary international society, that is not any society, but the society which is dominated by the US in the final throws of its imperialist dominance.

The chapter on the implosion of the legal subject, the US, illustrates what the implications might be for international law, of a poststructuralist interpretation of the end of the subject, a favorite theme of postmodernism. The primary aim, in the spirit of a pluralism of methods, is to see what this approach can yield as an understanding of the context in which some American international legal argument is constructed. The chapter does not have the aim to address in legal terms the quality of those legal arguments; quite the contrary, it aims to insist on the necessity of entering the unfamiliar ground of cultural

history and social psychology (albeit through a specific postmodern lens), of which the legal discourse is derivative.

The following chapter treats the same subject, the US, again at the present time, through the lens of a geopolitical neo-Marxist critique, that is, maybe ironically, diametrically opposed to a poststructuralist critique. Effectively, it takes up again the themes of the chapter on the law on the use of force, by stressing that the predatory imperialism of the US, as now a latest representative of 'the West,' has its roots in the dynamic of the classical state as a capitalist enterprise. Harvey's theory of accumulation through dispossession is an updating of the plundering of 'the native world' legitimized by Grotius and Vattel. The chapter does have a larger ambition than the previous one by relating the US to the entire international system in both its economic and political-military aspects, also within an historical perspective.

Without rejecting either poststructuralism or neo-Marxist geopolitical analysis, the book concludes with two chapters that are a rather confident and maybe over-optimistic appeal to a humanist phenomenology that affords plenty of hope for a world society of individuals who can accept personal responsibility for their own actions and approach others with a tactful respect, measuring always the distance which any autonomy necessitates. I believe the two approaches outlined in chapters 5 and 6 serve to unravel the underlying structures, the collective unconscious of international society, helping radically to increase our awareness of the crises, which confront us. However, they do not preclude a rational unraveling of the ideology of what I call liberal democratic hegemony.

The penultimate chapter offers an analysis of where we are now with Hobbesean man, the warrior marketer, with his battle songs of democracy, human rights, and the rule of law. It considers the rootedness of some already existing American philosophies of international law, in the languages of spreading democracy and the rule of law. The chapter traces the connections between rights and legal sanctions in the theories of validity of the analytical approaches to law, dominant in the Anglo-American legal tradition. Again accepting the intimate connection between economic, political, and military questions, the chapter enters the constitutionalist debate about what would be the minimal conditions for an international law of humanitarian intervention to enforce human rights. It situates this in the same predatory individualism, which Tuck has located between Grotius and Kant. The chapter concludes with a critical legal theory

response to liberal legal discourse. The primary function of politics, i.e. democracy and its junior partner, the rule of law, has to be as an alternative to civil war, whether national or transnational. This supposes the search for a constitution absent at present. Hence, the weakness of formal institutions makes all the more pressing the need for material standards of conduct, for ways of thinking them through and helping them to evolve.

The final chapter is an optimistic review of possible philosophical overcomings of the Western liberal tradition, through Paul Ricoeur's phenomenological, humanist response to Hobbes and Hegel, *from an order of fear to one of respect*. Phenomenological analysis takes one through the cultural imperialism that Steiner can trace by means of his theories of translation. These techniques of minute analysis can be applied through the theory of 'the Other' developed in the *Orientalism* debate, onto a deconstruction of all fundamentalist discourses through a phenomenological philosophy of tact and distance, a true pluralism that can ground a genuinely liberal world society. All of this can and has to be applied to conflicts characterized as easily discernible phenomena of broken, immature relationships. For Ricoeur the final foundation for any legal order rests in the maturity of *persons and communities in relation*.

Notes

1 *Dictionnaire*, 2nd edition, gen. ed. A. J. Arnaud (1993), entries by Sylvie Cimamonti and Aulis Aarnio, respectively.
2 See, in the Picardy Colloquium, Annick Perrot, *La Doctrine et l'hypothèse du declin du droit* (1993) 180, the entire article, but esp. 198, etc.
3 *Dictionnaire*, entry on Realism, Scandinavian, by Enrico Pattaro. Ross produced a *Textbook of International Law* in 1945.
4 Ludwig Ehrlich (ed.), *Works of Paulus Vladimiri (A Selection)* (1968) Vol. II, from 1st Tractatus (1417), 203.
5 Ibid., Vol. I, Controversy with Frebach, Quoniam Bror (1417) 308.
6 Stanislaus F. Belch, *Paulus Vladimiri and his Doctrine Concerning International Law and Politics* (1965), Vol. 1, 213–14.
7 Ibid., 233.
8 Ibid., 233–6.
9 P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (1983).
10 Jens Bartelson, *A Genealogy of Sovereignty* (1995) 128.
11 Ibid., 108.
12 Ibid., 110.

13 Ibid., 130–1. Bartelson applies these remarks to Vitoria.
14 Ibid., summary of the whole of chapter 5, '*How Policy Became Foreign*,' 137–85, Bartelson.
15 E. Jouannet, 'L'Emergence doctrinale du droit international classique. Emer de Vattel et l'école du droit de la nature et des gens,' PhD thesis, Paris, 1993, 447–8, 458–9.
16 Ibid., 472–5; Bartelson, 'How Policy Became Foreign,' 194–5.
17 The literature on this subject is now legion. I offer a survey of the main characters in Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law,' in *The European Journal of International Law* V. 2 (1991) 66–95. The continued dynamic of this debate is illustrated by the opening and closing paragraphs of John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case,' *Ox. JLS* 16 (1996) 85–128. He draws a distinction between the positivist statist concept of international society and a natural law orientation which gives a communitarian concept of the society.
18 See the 'Conclusion', British Institute of International Law (ed.) *Theory and International Law, An Introduction* (1991) 119–21.
19 Referring to M. Koskenniemi, 'The Future of Statehood,' 32 *Harvard ILJ* (1991) 397 at 407.
20 Tasioulas, 'In Defence of Relative Normativity,' 128.
21 A. Carty, 'Why Theory? – The Implications for International Law Teaching,' in *Theory and International Law, An Introduction*, 75, 77.
22 J. Crawford, 'Public International Law in Twentieth-century England,' in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted, German-speaking Émigré Lawyers in Twentieth-century Britain* (2004) 681 at 699. 'Self-conscious exercises in "grand theory" in international law are a more recent phenomenon', referring to the work of David (not Duncan) Kennedy, M. Koskenniemi, P. Allott, and S. Marks. These are the theorists mentioned in the last section.
23 T. Baty, *International Law in Twilight* (1954) 10.
24 Crawford, 'Public International Law in Twentieth-century England,' 686 and 689.
25 What follows comes from Carty, 'Why Theory?,' 88, with citations omitted.
26 In *The Liberal Tradition, From Fox to Keynes*, ed. Bullock and Shock (1967) 165–7.
27 D. H. N. Johnson, 'The English Tradition in International Law,' *International and Comparative Law Quarterly* 11 (1962) 416, at 425, with a quotation from the first edition of his *International Law* (1900). Smith held numerous offices of state, but, for Johnson, the most significant example of the practice was Sir William Harcourt, who was both

Whewell Professor of International Law in Cambridge and a leading Liberal statesman through the Gladstone ascendancy.

28 What follows is taken from 'Why Theory – Implications for International Law Teaching,' 78.

29 R. Y. Jennings, 'The State of International Law Today,' *Journal of the Society of the Public Teachers of Law* (1957–58) 95 at 96.

30 Preface to the *Annual Digest of International Law Cases, Years 1925 and 1926* (1929) x.

31 Ibid.

32 Crawford, 'Public International Law in Twentieth-century England,' 700.

33 See further A. Carty, 'Visions of the Past of International Society, Law, History or Politics,' in the *Modern Law Review* 69(4) (Spring 2006), 644–60.

34 Martti Koskenniemi places the change in continental Europe in the 1950s, in *The Gentle Civiliser of Nations* (2002), 3, while David Kennedy is closer to the view expressed here that the shock of the Great War led international lawyers to hope, in his view somewhat magically or mysteriously, for peace through institutions, or even the language of institutions, see David Kennedy, 'The Move to Institutions,' *Cardozo Law Review* 8 (1987), 841, esp. to 849.

35 See Casper Sylvest, 'International Law in 19th Century Britain,' *British Yearbook of International Law*, LXXV (2004) 9–70; and John Anthony Carty '19th Century Textbooks on International Law,' unpublished thesis, Cambridge University, 1973, esp. Part VII, 'International Law in England, The Textbooks,' 277–379.

36 Carty, 'Why Theory? – The Implications for International Law Teaching,' 79–82 describing the state as an institution, a perspective most amenable to the superimposition of international institution, although obviously not causing them, merely catching the mood of the times, as a representative thinker.

37 J. Brierly, *The Basis of Obligation in International Law, and Other Papers*, ed. H. Lauterpacht (1958) 41–2.

38 Johnson, 'The English Tradition in International Law,' 432 ff.

39 Ibid., esp. 432.

40 Correlli Barnett, *The Verdict of Peace* (2001) 51–2, from the chapter, 'The Principal Partner of America in World Affairs,' tracing the symbiotic, if still unilateral, dependence of Britain on the US back to the Korean War.

41 The basic material for critique is provided by a leaked report of a meeting in July 2002 between Tony Blair, Jack Straw, Lord Goldsmith, and a Service Chief, which had such a character that it must have outraged a very senior government official who knew of it. The report indicated a political decision to manipulate public opinion against Saddam

Hussein to prepare the country for war: reported and reproduced in *The Sunday Times* May 1, 2005, available on *www.timesonline.co.uk* (the secret Downing Street memorandum).

42 Bartelson, *A Genealogy of Sovereignty*, 188–201.

43 I am referring to the work of figures such as, above all, George Scelle, but also James Leslie Brierly and Hans Kelsen. See further a systematic treatment of these authors for a questioning of state sovereignty in Jane E. Nijman, *International Legal Personality* (2004) 85–243.

44 See Anthony Carty, 'Convergences and Divergences in European International Law Traditions,' *European Journal of International Law* 11 (2000) 713, esp. 726–8, considering the French tradition of the state in international law. I will come to these themes again in the chapter 3 below.

45 See, for instance, Paul Ricoeur, *The Conflict of Interpretations* (English translation Northwestern Press 1974) ed. Don Ihde (2004) especially the chapter, 'Structure and Hermeneutics,' translated by Kathleen McLaughlin, 27–60, where Ricoeur confronts primarily the structuralist anthropology of Lévi-Strauss with his phenomenological doctrine of intentionality; also Anthony Carty, 'Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law,' *European Journal of International Law* 14 (2003) 817, esp. 836–40, on the importance of becoming aware of the constraints of culture heritage and personal history, above all through the dialectic of intersubjectivity.

46 Carty, 'Critical International Law,' 67–70.

47 A. Carty, 'Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt,' *Cardozo Law Review* 16 (1995) 1235–92.

48 Carty, 'Why Theory – Implications for International Law Teaching,' 73, 97–9.

2

CONTINUING UNCERTAINTY IN THE MAINSTREAM

1

There is no consensus among International lawyers on a workable or operable concept of general customary law, supposed to be the fundamental source of an international law binding upon states. It is thought to represent an analytical framework within which one can assess whether states recognize a rule, principle, or practice as binding upon them as law. Jurists are to examine the same 'raw material' of international relations as diplomats, statesmen, historians, and political scientists. Yet according to the most orthodox view, expressed in the jurisprudence of the ICJ the jurists are to find that states have, in some sense, a legal conscience or sense of conviction. In the *North Sea Continental Shelf* cases the ICJ said that the 'practice of states' relevant to the assertion that a rule of customary international law exists must:

> be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*) . . . The states concerned must therefore feel that they are conforming to what amounts to a legal obligation . . .[1]

The basic problems with this formulation have been put squarely by Sorensen and D'Amato. Sorensen points out how the very nature of relations among states makes ascertainment of an evolving customary law virtually impossible. Diplomatic negotiations remain so closed and secret that not even the representatives of one state will know what are the underlying motives of their opposite numbers. Yet such motivation is essential to the psychological element of custom.[2] D'Amato has been equally direct in questioning any possible legal method of observing customary law evolving out of the consciousness of a modern bureaucratic state.[3]

It appears impossible to speak of states having an identity that allows one to suppose that, as centers of subjectivity, they have

acquired a sense of obligation with respect to a particular matter. If the state is viewed as a corporate entity, the legal order that supports it should define the organs of the state competent for the purpose of creating general custom, and, furthermore, specify when in fact the organs are acting to this end. Yet the international legal order does not do this. Jurists are left fumbling with the idea that the state is itself, as a totality, in some undefined way, capable of having a 'legal sense' that it is bound by a general custom, which may even be supposed to be already existing. The reaction of some jurists has been to try to dispense with the psychological element of general custom altogether, yet without abandoning the concept of general custom itself.[4]

Pierre-Marie Dupuy provides an exhaustive and authoritative account of the formal problems for the international legal profession. In his *Hague Academy Lectures* he draws attention to the fact that the profession must face a deficiency: 'that, precisely, of the existence of *procedures,* duly formalised by the law itself, for the creation of customary norms . . . '[5] Dupuy remarks how there are very detailed rules for the conclusion of treaties, 'but, there are not, to the contrary, to borrow the terminology of Hart, secondary rules governing the conditions of formation of custom . . . One contents oneself to affirm unilaterally that the rules of custom exist or one awaits a judge to say so himself, in place of the states . . . '[6] Until there is some form of 'revelatory proof of its existence, generally judicial, a rule of custom remains a virtual rule. The paradox is that, trapped in its theoretical premises, the most classical positivist doctrine, says Dupuy, nonetheless persists in seeing in custom, despite this absence of forms, a formal source of law with respect to the conditions of its creation, and not merely with respect to its content. [7]

There is a clear residual confidence among international lawyers that the international judiciary can 'reveal,' to use Dupuy's language, the presence of custom, and turn it from virtual to real law. Yet, it is almost a commonplace of legal doctrine that the ICJ has reached decisions in such cases as the *Fisheries Jurisdiction* (1974) or the *Advisory Opinion on Namibia* (1971), in the face of so much conflicting state interest and interplay of power, as to leave one at a loss as to how general custom is supposed to arise out of state practice.[8]

A number of recent landmark cases in the jurisprudence of the ICJ indicate that its use of the concept of general custom has not become less problematic. In the 1986 case *Certain Military Activities Concerning Nicaragua* the ICJ affirmed a formal principle with respect to sources of law. The mere fact that states declare their

recognition of certain rules does not make these rules customary law, without the essential role, required by Article 38 of its Statute, played by general practice.[9] This means there should be a practice to confirm a legal discourse. There must be conduct of states consistent with rules, or at least inconsistent behavior should generally be treated as breaches of the rule.[10]

The difficulty facing the Court was fundamental. There appeared to be a general rule, recognized in numerous declarations, that intervention in the internal affairs of states is illegal. However, interventions are frequent, especially by the US; in this case, in Nicaragua. The Court decided first, that the rule existed, and then asked whether exceptions had been recognized.[11] Then it changed the object of analysis away from actual practice, in the sense of externally observed conduct, to the delicate subjective element, declarations of opinion concerning conduct. The principle of intentionality is introduced as decisive, although the starting point of the Court's analysis was that it could not be given separate analysis.

So the US authorities clearly state grounds for intervening in a foreign state for reasons

> connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law . . .[12] [In this case] . . . the US has not claimed its intervention, which it justified in this way on the political level, was also justified on the legal level . . . [where it] has justified its intervention expressly and solely by reference to the 'classic' rule involved, namely collective self-defense against armed attack . . .[13]

Here the Court is speculating about state intentions that are not completely transparent. The Court can freely classify as political/insignificant, or legal/significant, what it likes about the intentions of states, which the Court, is, in any case, projecting onto the states. States are unwilling to give formal, principled declarations in favor of their actions. The US is in fact giving substantial material support and training to armed bands which are attacking a foreign state. The US was claiming the right to come to the aid of an opposition group (the Contras) in a country led by a one-party communist regime (the Sandinistas), which had undertaken to hold free elections at a meeting of OAS Foreign Ministers. It had not done so. The Court, as it were, declassified this undertaking as itself political/insignificant, a pledge made not only to the OAS, but also to the people of Nicaragua.

However, 'the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections . . . '[14] Only legal force, as characterized by the Court, is significant.

How far can the Court take its investigation into the *real intentions of states, or other collective entities*? The Court puts its position modestly: 'nor has it authority to ascribe to states legal views which they do not themselves advance . . . '[15] This limitation is particularly important when the Court is in fact equating the state of Nicaragua with the national *junta* of reconstruction (the Sandinistas). A US Congressional finding was that the Nicaraguan government has taken significant steps towards establishing a totalitarian communist dictatorship. The Court responded that:

> adherence by a state to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of state sovereignty, on which the whole of international law rests. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the respondent complained of . . . [16]

Normally, legal intention (i.e. seriousness) can be inferred from action in an area or field, which is itself taken to be serious. Where the US gives military support to opposition parties to overthrow a communist regime in a Latin American state, it can only be supposed that it is extremely serious about what it is doing. It is difficult to see what is gained by the Court treating some state intentions (whether of the US or of Nicaragua) as political and others as legal. This appears to be a 'head in the sand' approach, which denies the international law profession the analytical framework to grasp fully the *intentionalities* of the parties engaged in a conflict, thereby penetrating beyond the corporate veil of the state to find the subjective elements within it.

The ICJ was faced with an issue of high politics. This should provoke reflection upon the question whether the traditional analytical tool of general customary law is suitable for the elements of idealism and realism, altruism and state egotism that are at play in the legal phenomena of international relations. The US determines that its interest or national security cannot tolerate the close proximity of a new neighbor (Sandinista Nicaragua) dedicated, in its view, to an irreconcilably hostile ideology. It is very problematic for the legal positivist to ask himself categorically, in each atomistic instance,

whether the state has or has not acted on the basis of a legal conviction. Yet it is inevitable that a state will form some ideal view of what it needs to undertake for its own security. Is there no analytical framework within which one can assess critically how the state attempts to do this?

Legal positivism has, since the French Revolution, given expression to the idea that the will of the state is, in fact, the democratically expressed will of the people, constituted as a nation.[17] There is very little official state disagreement about this rather confused hotchpotch of political-legal ideas, which has come out of European culture since the French Revolution. This view of democracy combines with a vaguely benign view of a romantic nationalism, which supposes that peoples as group actors constituted in states are sufficiently motivated by idealist ideologies for their international relations to signify more than a mere interplay of Machiavellian calculations of state interest.

This is not to say that legal imagination must be defeated by the complexities of international life, only that it must rethink the options that the language of general customary law offers. One may illustrate the possibilities by contrasting two Frenchmen reflecting, also in the 1980s, on the general legal significance of the third United Nations Conference on the Law of the Sea.

A former head of the French Foreign Office legal department formulated a relevant thesis while still a judge of the ICJ. De Lacharrière argues that a state has inevitably conflictual relations with other states and will, as far as possible, formulate and interpret a rule of posited law to its own advantage and equally to the disadvantage of its neighbor. The international lawyer, as a legal scientist, must observe, in a detached manner, the particular convergence of circumstances which persuades a state that it has no choice, if it is to have another state agree to something which it does not want, but to agree to a measure of what it does not want. Throughout his text de Lacharrière develops a lucid account of the most extensive possible negation of Kant's categorical imperative – do as little as possible to base your conduct on a general principle applicable to everyone, but subject to your being aware that the determination of others to do precisely the same will mean that you will end up somewhere in the middle.[18]

Particularly important are de Lacharrière's reflections on the drafting and conclusion of treaties as evidence of the evolution of general customary law – a principle given great attention by the ICJ in both the *North Sea Continental Shelf Case* and the *Certain Militaries Activities (Nicaragua) Case*. The Law of the Sea Convention (1982)

is a treaty. Concerning its value in international law, de Lacharrière insists that treaties are used by states merely as a convenient technique to predetermine conduct in international relations. Insistence upon their application will depend very much on whether states intend their own behavior to correspond to the treaty. Furthermore, the process of drafting a treaty is that of a diplomatic conference and it is therefore unscientific to attempt to transform this essentially pragmatic environment into the academic straitjacket of the search for an *opinio juris* of states with respect to the formation of customary law. This is simply another way of saying that the diplomatic representative is authorized to achieve what advantage he can through negotiation. The act of ratification by government and parliament is quite separate. Finally, there is nothing remarkable about states taking up positions that are analytically or doctrinally inconsistent or incoherent. The doctrine of estoppel is a judicial invention which does not correspond to how a state formulates its view of its own interests. The basic principle of state conduct is that each state insists naturally on its own specificity. At the same time each state sees itself as a unique representative of universal values, but precisely in the sense that these are understood to give specific significance to its own practice in terms of the development of general customary law.[19]

None of this is to say that international law does not exist. It is simply that scientific study of its functioning has to focus on the techniques that states employ to manipulate legal phenomena. There is not a single international law. There are the external legal policies of as many states as are active with respect to an issue.

De Lacharrière supposes that any other conception of the subject rests on suppositions of legal transcendence or idealism. If a law is felt by a state to be a constraint imposed from above, this means only that other states have effectively imposed something on it. He denies vigorously that there is an international legal order (or community) which grants any competences to states with respect to a matter not yet regulated by them. It is pure reification to say that states are acting within a legally limited discretion in terms of powers delegated to them. States retain control of the interpretation of international law, so there is merely an application of multiple conflicting state policies.[20]

Alternatively, René Dupuy argues that there is an open dialectic between the spirit of co-operation and of conflict in international relations. The dialectic is not a monopoly of any particular state, but represents a permanent antagonism among states which are independent yet interdependent. This is not a Marxist dialectic, which supposes an

inevitably positive synthesis. The dialectic expresses the fact that relations among states are constantly disintegrating and then being reconstituted towards some semblance of harmony. Every progress contains a contemporaneous regression within it. A pattern of contradiction is universal and does not simply reproduce in a superstructure of international law the material antagonisms of the infrastructure of international society. Dupuy means to state that at present the weaker members of this society oppose a different concept of the structure of the law itself to those of the stronger. They oppose an institutional view of law to the traditional relational one, or more simply a vertical to a horizontal one. Neither approach enjoys preeminence, and indeed particular states may change roles within this spectrum.[21]

The institutional approach reflects what Dupuy calls an old French tradition as to the nature of general customary law – that it is a spontaneous growth, which has its origin in a common conscience of the members of society without anyone having formulated it precisely. This is not a naïve formulation of the value of state practice. On the one hand, there is always a firm refusal of states to accept any principle that transcends them – the relational approach. Each is self-sufficient for himself. On the other hand, there is the push to create rules and means of applying them which are above states. The former approach joins necessarily the notions of power and law in the same subject, whereas the latter approach, the institutional concept of international law, distinguishes firmly between the state and the law, reducing the former to be a subject of the latter. However desirable this may appear as a means of controlling power, the nature of international society is such that it makes no sense to try to deprive nation-states of their specific identities, to encourage an excessive institutionalization, which freezes their specificity.[22]

Dupuy recognizes that there is no denying the fragility of communitarian 'strivings' to go beyond the selfhood of the individual state. He argues that the concept of community, like other basic legal concepts, such as contract, treaty, etc. is a myth, in the Sorelian sense. It mobilizes forces. It is not designed to put an end to ideological conflict, but reflects a concrete democratic egalitarianism that is constantly in a state of struggle. It is accompanied by the disappearance of the characteristic of generality in law in favor of differentiation. The latter marks the refusal to accept the quasi-mystical notion of Rousseau that law should be general and abstract. Struggle is to make law, as far as possible, concrete and situational. In a sense, what one

is experiencing is a return to the pre-Revolutionary concept of law as directed to the needs of a variety of distinct legal subjects, rather than accommodating one universal and abstract legal type.[23]

The mythical force of legal concepts has a destabilizing effect on rules of law. The roots of this force are to be found not in the state itself, but in the rights of peoples, who are the real sovereigns. The notion of community is a link concept, which takes issues out of the purely relational context and pushes them towards institutionalization. Notions such as *res communis*, under the 1982 Law of the Sea Convention, even without the agreed authority to manage it, operate to impose on independent states a duty to act with a discretion, which requires the rational management of humanity's resources for its benefit. No state can be compelled to be a part of an international organization against its wishes. Yet, however much it may try to resist, no state can behave as if it existed in a purely relational system of law, free to do whatever it had not committed itself not to do.[24]

Whatever the absolute merits of the theories of de Lacharrière and Dupuy, they point to the need for a framework of analysis of state practice which allows one some means to question: elements of naïve positivism (that law is simply there to be described); superficial idealism (that rhetoric about community and development has prevailed in reality); and democratic, nationalist prejudice (that whatever any Western democracy's state authorities have approved has become law).

2

A later landmark case, *Legality of the Threat or Use of Nuclear Weapons* (1996), shows, to an acute degree, the intensity of contradiction between realism and idealism in analysis of what is, above all, the state practice of liberal, democratic Western states. The difficulty with this case was how to square the commitment of states to principles of humanitarian law and, at the same time, their reliance upon nuclear deterrence as a central part of their strategic defense policy. The aim of the latter is the elimination of large centers of enemy population, indeed the elimination of entire enemy societies, while the basic principle of humanitarian law is that there is a distinction between combatants and non-combatants, that war must remain limited to military defeat of the enemy.

The dissenting opinions of Judges Higgins and Schwebel contrast with the majority opinion of the Court to evidence distinct coyness

about positivists grappling with 'the realities' of the 'practice' of contemporary states. From the beginning, the Court was aware that the question existed, whether the present international law system had relevant rules on the issue of threat or use of nuclear weapons. It responded that its function was not to legislate, but to state the existing law. Somehow it could also say, 'An entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all . . .' (para. 18). What the Court might mean by such a promise of self-restraint became clear in its consideration of the exercise of the right of self-defense. Quoting itself in the *Certain Military Activities in and against Nicaragua Case,* it said that self-defense 'would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law . . .'(para. 41). Certain states argued that the very nature of nuclear weapons and the high probability of escalation of nuclear exchanges mean there is an extremely strong risk of devastation. Then the Court went on to make a remarkable statement about the sharing of responsibilities between a reviewing Court and sovereign states, in the post-Vattelian subjectivist international legal order:

> The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by states believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality . . . (para. 43)

This is all the Court has to say about the compatibility of the strategy of nuclear deterrence with the principles of the UN Charter, that is, whether as a means of self-defense the threat or use of such weapons 'would necessarily violate the principles of necessity and proportionality . . .' (para. 48).

The Court is on stronger ground when it says that the illegality of the use of certain weapons as such does not result from an absence of authorization, but, on the contrary, is formulated in terms of prohibition (para. 52). In the past two decades a great many negotiations have been conducted regarding nuclear weapons, but they have not

resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons (para. 58). A key issue is the legal significance of the Treaty on the Non-Proliferation of Nuclear Weapons. Those states supporting the legality of the use of the weapons say the very logic of the treaty is on their side. The treaty evidences the acceptance of the possession of nuclear weapons by the five nuclear weapon states. '[T]o accept the fact that those states possess nuclear weapons is tantamount to recognising that such weapons can be used in certain circumstances . . . ' (para. 61). The Court concludes that such treaties 'could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves . . .' (para. 62).

Surprisingly, the Court distinguishes this interpretation of treaty practice from customary law, which it gives the usual definition of actual practice and *opinio juris* of states (para. 64). Some states refer to a consistent practice of non-utilization of nuclear weapons since 1945 as an *opinio juris* that such non-use evidences a conviction that use would be illegal (para. 64). Other states invoke the doctrine and practice of deterrence as showing that states have 'always reserved the right to use those weapons in the exercise of the right to self-defense against an armed attack threatening their vital security interests . . .' So, non-use merely means the circumstances that might justify their use have not arisen (para. 66). There follows an absolutely extraordinary and, in my view scandalous, pronouncement of the Court, which shows the utter bankruptcy of the doctrine of positivist customary law:

> The Court does not intend to pronounce here upon the practice known as the 'policy of deterrence'. It notes that it is a fact that a number of states adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*. (para. 67)

Having closed off argument on the *ius ad bellum* and nuclear weapons, the Court puts the whole weight of argument on the compatibility of nuclear weapons with the principles of humanitarian law. The Court says it has not found a conventional rule of general scope or a customary rule specifically proscribing the threat or use of

nuclear weapons (para. 74). However, the fact that humanitarian law pre-dates the advent of nuclear weapons, and that its development through conventions did not explicitly take the weapons into account, does not preclude the application of the law to the weapons. Any other conclusion, says the Court, 'would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons . . . In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the later, has not been argued in the present proceedings . . .' (para. 86).

When the Court came to consider how the principles would be applied, it observed that none of the states advocating legality in certain circumstances has indicated what would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into all-out use of high-yield nuclear weapons. Once again the Court restrains itself: 'This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view' (para. 94). Conversely, the Court would not make a determination that use of nuclear weapons would be illegal in any circumstances due to their inherent and total incompatibility with the law applicable to armed conflict. The weapons would scarcely seem to be reconcilable with the law. Nevertheless, 'the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules applicable in armed conflict in any circumstances . . .' (para. 95).

In fact, it is the subjectivity of liberal, post-Vattelian international law that is determining the Court's conclusion. The Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can the Court 'ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years . . .' (para. 96). This leads the Court to say, effectively, that because it cannot penetrate the meaning or significance of state practice, it cannot say whether the use of nuclear weapons would be illegal where states are actually going to invoke the right:

> Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, *and of the elements of fact at its*

> *disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake* . . . (para. 97; author's italics)

It is hardly surprising that Judge Higgins comments that at no point does the Court engage in a systematic application of the relevant law to the use or threat of nuclear weapons. 'It reaches its conclusion without the benefit of detailed analysis. An essential step in the judicial process – that of legal reasoning – has been omitted . . .' (para. 9). Yet Higgins is equally operating within the Vattelian principles of subjectivity. She objects to the idea that the Court is implying that states could justifiably use nuclear weapons to ensure their survival, even if that involved a violation of humanitarian law. This goes beyond what nuclear weapons states were claiming, namely they always accepted that they would have to comply with humanitarian law (para. 29). What she means is a reference to the same pure subjective belief of sovereign states that prevents the Court itself from penetrating state practice. So Higgins argues, 'If a substantial number of states in the international community *believe* [author's italics] that the use of nuclear weapons might *in extremis* be compatible with their duties under the Charter (whether as nuclear powers or as beneficiaries of 'the umbrella' or security assurances) they presumably *also believe* [author's italics] that they would not be violating their duties under humanitarian law . . .' (para. 33).

It is the role of the judge to resolve in context and on grounds that should be articulated why the application of one norm (e.g. humanitarian law) rather than another (e.g. the right of self-defense with nuclear weapons) is to be preferred (para. 40). So Higgins reaches a conclusion identical to that of the Court for exactly the same reason, the systemic character of international law as a liberal (i.e. Hobbesean) order of raging subjectivities, none of which can trust one another. It is hardly surprising that a collection of judges can do nothing in the face of such moral chaos:

> In the present case, it is the physical survival of peoples that we must constantly have in view. We live in a decentralised world order, in which some states are known to possess nuclear weapons but choose to remain outside of the non-proliferation treaty system; while other such non-parties have declared their intention to obtain nuclear weapons; and yet other states are believed clandestinely to possess, or to be working shortly to possess nuclear weapons (some of whom indeed may be party to the NPT). *It is not clear to me that either a pronouncement of illegality in all*

> *circumstances of the use of nuclear weapons or the answers formulated by the Court in paragraph 2E best serve to protect mankind against that unimaginable suffering that we all fear* . . . (para. 41; author's italics)

Judge Schwebel adds to Higgins' critique illustrations of what it could mean to give substance to a serious analysis of state practice as an avenue for exploring the evolution of customary international law. Schwebel argues, pointedly but in general terms, that state practice demonstrates that nuclear weapons have been manufactured and deployed by states for fifty years. In that deployment inheres a threat of possible use. Nuclear powers have affirmed they are legally entitled to use nuclear weapons in certain circumstances and to threaten use:

> They have threatened their use by the hard facts and inexorable implications of the possession and deployment of nuclear weapons; by a posture of readiness to launch nuclear weapons 365 days a year, 24 hours of every day; by the military plans, strategic and tactical, developed and sometimes publicly revealed by them; and, in a very few international crises, by threatening the use of nuclear weapons. In the very doctrine and practice of deterrence, the threat of the possible use of nuclear weapons inheres . . . This is the practice of five of the world's major Powers . . . significantly supported for almost 50 years by their allies and other states sheltering under their nuclear umbrellas . . . It is obvious that the alliance structures that have been predicated upon the deployment of nuclear weapons accept the legality of their use in certain circumstances . . . (pp. 1 and 2)

Schwebel goes on to discuss at length (pp. 9–12) one instance of an implied threat of the use of nuclear weapons which he considers had a positive effect in ensuring international public order in terms of international law. In the case of *Desert Storm*, the 1991 war against Iraq, the US feared that Iraq might deploy chemical and biological weapons against its opponents. The US Secretary of State reports, after the event: 'I purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation . . .' (p. 10). Schwebel relies on a further *Washington Post* article for evidence that the Iraqi authorities translated the various ambiguous, but grievous and devastating US threats to mean it would respond to Iraq's use of chemical and biological weapons with nuclear arms (p. 11). Schwebel concludes that this affords an example of how the UN Charter was sustained rather than transgressed by a nuclear threat. The threat may have made a critical contribution to the UN triumph. This is not a case of the end justifying the means, 'It rather demonstrates that, in some circumstances, the

threat of the use of nuclear weapons – as long as they remain weapons unproscribed by international law – may be both lawful and rational' (p. 12).

The issue of the legality of nuclear deterrence may be different from that of superpower, ideologically-driven interventions. The existence of nuclear weapons for more than half a century, and the apparent fact that their development cannot be reversed, point in the direction of structures which present generations have simply inherited. How can liberal democratic Western states embark upon security strategies which include a willingness to obliterate entire societies, as a way of ensuring one's own security? The answers lie in historical processes. The foundations for total war waged with nuclear weapons, bringing with them the complete destruction of one's enemy, were firmly laid by 1945. They amount to nothing more or less than the continuation of strategies used during the last war, resting upon an ideology of total war. Doctrines associated with nuclear deterrence come later and have not modified the essential strategic assumptions or what the armed forces are actually organized to do. Questions of the credibility of the deterrence, the morality of a conditional threat to carry out an act in itself admitted to be immoral, etc., are raised when there is already a commitment to a type of warfare in which the absolute destruction of one's opponent is regarded as normal. Certain strategic practices have become institutionalized. One has still to trace out historically and recognize exactly where responsibility for this institutionalization rests.[25]

It is inherently difficult for a judiciary to consider anything other than individual, or collective, responsibility of contemporary actors. Yet the law has to find some way of facing issues of historical responsibility. It is not enough to start from where we are now. Nuclear strategies are embedded in wider, institutionalized military-economic strategies. It is simplistic to say that one has to balance considerations of humanitarian law with legitimate claims to use certain instruments of self-defense, when it has been decided long ago that the most economical way to wage war has been to bring it to the enemy civilian population. No piecemeal reversal of policies is conceivable. We are faced not so much with individual, present moral dilemmas as with the baleful consequences of wrong actions. The extent of the crisis is expressed by the American sociologist Robert Nisbet. He concludes his study of what he calls the lure of military society thus: 'that only events presently unforeseeable in nature and scope . . . could possibly arrest the present drive of militarism in the Western world . . .'[26]

The complexity of the issues includes the following two elements. First, there has been a remarkable lack of concern in the West about the scale of casualties that nuclear deterrence could cause, suggesting a general public denial psychosis which a judicial process could hardly be a suitable forum to penetrate. Second, one needs to understand the responsibility that German and Japanese aggression bears for a dehumanization process in which the Allies, in turn, implicated themselves when they undertook total war. Garrison captures this dimension in the provocative remark that the conflagration with Germany was the outcome of psychic conditions that were universal 'only while the Germans threatened a single people with genocide, the nuclear arms race threatens the entire human race with extinction . . .'[27]

Higgins and Schwebel come closer than the Court to facing the implications of nuclear deterrence in state practice. Yet their own approaches lack the historical perspective that reveals how moral choices are already frozen in practice. The balance of humanitarian law and the law of self-defense has long ago been decided in favor of the latter. A legal analysis, which is to challenge or even understand this, requires a dimension of *opinio juris* in state practice that recognizes the contextual and structural dimension of states as historical communities.

3

Two more cases of the International Court of Justice concern an apparently more focused and manageable issue: the protection of the sovereignty of the state. First, the issue was whether the Foreign Minister of a state is entitled to sovereign immunity from prosecution by another state; the second was whether the construction of a wall beyond the recognized territory of a state is necessary for its national security. There is an extensive international relations literature highly critical of the alleged crudeness of a 'vital interests' or 'national security'-obsessed perspective on international relations.[28] At the same time, there is a lack of interest among international lawyers in questions such as whether states may put their subjectively conceived vital interests above international law. This is the question whether international law is observed – sometimes yes, sometimes no, but more often than not, and, anyway, the issue that such conduct raises is meta-juridical.

Yet the question has come up in the International Law Commission's discussion of the draft articles on state responsibility, in connection

with the concept of state necessity. According to this a state may commit an act which injures the rights of other states where there is a grave and immanent threat to the vital interest of a state, which was not provoked by it and which cannot be overcome in any other way. It is recognized that such a concept is vague and yet it is impossible, even if desirable, to arrange compulsory adjudication of the use of the concept by states. In the mid-1980s the view of the Special Rapporteur to the ILC was that the concept was so deeply rooted in the general theory of law that silence on the issue would not serve to exclude its continued application. Yet the ILC declares a lack of interest in the theoretical foundation of the right. It does not matter whether it is a question of violating a subjective right of another state, or whether there happens to be somehow two conflicting abstract norms, which, fortuitously, cannot be applied simultaneously at a particular point in time.[29] It is not recognized by the judiciary that balancing of principles (humanitarian law/self-defense; sovereign immunity/prosecution of universal crimes) is never going to take place as long as judicial tribunals and the ILC choose not to elaborate a theoretical analysis which takes as its starting point the actual conduct of states rather than formal arguments based on the logical structure of the idea of law as such.

3.A

In the *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium)[30] the Court easily reached the conclusion that an arrest warrant issued by a Belgian judge against the incumbent Foreign Minister of a state violated the law of sovereign immunity. The alleged crime was that the hate speech of the Minister provoked racial killings of Congolese in the Congo, some of whom invoked a Belgian law promising universal jurisdiction. At the time the warrant was issued the Minister was not in Belgium. The issue is so controversial, because it has been squarely posed that state officials commit certain types of crimes as state officials and that the very idea of granting them immunity because they are state officials impedes the development of criminal law. However, both parties agreed to narrow the case at issue to one of whether, *if Belgium could be assumed to have jurisdiction over the alleged crime,* it had exercised it unlawfully because the object of the warrant was an incumbent Foreign Minister. The Court observed that there was no directly applicable treaty and that customary law had to answer

the question. In the space of a few paragraphs it decided in favor of immunity. The Foreign Minister, responsible for the conduct of a state's relations with all other states, occupies a position such that, like the Head of State or the Head of government, he or she is recognized under international law as representative of the state solely by virtue of his or her office (para. 54). The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability . . . (para. 54). Even the mere risk of legal proceedings could deter a Foreign Minister from traveling internationally when required to do so to perform his functions' (para. 55).

Belgium argued that the Court still had to accept that immunity did not apply to the commission of war crimes or crimes against humanity. It relied on the logic of dicta in the *Pinochet Case*[31] that law can hardly establish a crime having the character of *ius cogens* and at the same time provide an immunity which is coextensive with the obligation it seeks to impose (para. 56). The Court responded, in one short paragraph (para. 58) that it had carefully examined state practice 'and had been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs where they are suspected of having committed war crimes or crimes against humanity . . .' As for the rules of international tribunals (such as Nuremberg, Tokyo, the International Criminal Court, etc.) concerning issues of immunity for persons having an official capacity, the Court 'finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts . . .' (para. 58). Finally, none of the international criminal court decisions (e.g. of Nuremberg and Tokyo) 'deal[s] with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity . . .' (para. 58).

A joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal attempted to challenge the technique of the Court, particularly in not addressing directly the question whether Belgium could claim universal jurisdiction over war crimes, etc. This should have set up a framework in which the Court would undertake the explicit task of balancing claims of universal jurisdiction against claims of sovereign immunity of Foreign Ministers.

The joint opinion affirmed that there was no established practice in which states exercise universal jurisdiction, as virtually all national legislation envisages links of some sort to the forum state; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction (*Pinochet* was treaty-based). Yet national legislation is not conclusive, as states are not bound to claim full jurisdiction. Equally the case law does not evidence *opinio juris* on illegality. State practice is neutral (para. 45). Also universal criminal jurisdiction exists for certain international crimes, where the principle *aut dedere aut prosequi* opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility and are widely regarded as today reflecting customary international law (para. 46). The dictum of the PCIJ in the *Lotus Case* also supports Belgium, as it would be necessary for an opponent to 'prove the existence of a principle of international law restricting the discretion of states as regards criminal jurisdiction' (para. 49; also PCIJ, Series A, No. 10, 18–19).

The joint opinion rejected the view of the Court that the battle against impunity of war crimes and crimes against humanity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters. None of the treaties (hostages, terrorism, criminal tribunals) excludes additional grounds of jurisdiction on a voluntary basis (para. 51). The only prohibitive rule is that criminal jurisdiction should not be exercised within the territory of another state. A possible arrest in Belgium or in a third state, at its discretion, in the words of the joint opinion, 'would in principle seem to violate no existing prohibiting rule of international law . . .' (para. 54). So, a state may choose to exercise a universal criminal jurisdiction *in absentia*. At this point the joint opinion introduces the element of balancing. '[T]he desired equilibrium between the battle against impunity and the promotion of good inter-state relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction . . . e.g. persons related to the victims of the case will have requested the commencement of legal proceedings . . .' (para. 59). The permissibility of jurisdiction can be deduced from the nature of the crime. As with piracy, war crimes and crimes against humanity 'are no less harmful to the interests of all because they do not usually occur on the high seas . . .' (para. 61).

However, the joint opinion still came to say that the increasingly recognized importance of pursuing international crimes has given rise

to the tendency 'to grant procedural immunity from jurisdiction only for as long as the suspected state official is in office . . .' (para. 74). These trends reflect a balancing of interests, that states should also allow officials to act freely on the inter-state level 'without unwarranted interference' (para. 75). National prosecution is the only credible alternative as a means of pursuit 'after the suspected person ceases to hold the office of Foreign Minister' (para. 78).

On the question of immunity as such of a Foreign Minister, the joint opinion recognizes that evidence of state practice is very scarce. The immunity is generally considered in the literature as merely functional. The judges refer to the Institute of International Law and the ILC, which did not extend to Foreign Ministers the immunities of a head of state (paras 80–2). Then, remarkably, the joint opinion continues:

> We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective states. During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and whereever engaged in the functions required by his office and when in transit therefor . . . (para. 83)

The point where the joint opinion differed from the Court was that once the accused ceased to be Minister for Foreign Affairs the illegal consequences attaching to the warrant also ceased, even though it continues to identify him as the minister (para. 89).

The joint opinion goes into much more detail about the grounds and extent of possible Belgian universal jurisdiction. It recognizes it as legal and as a necessary part of the development of international law in the pursuit of international criminals. It also recognizes the need for a balancing of interests between international criminal jurisdiction and sovereign immunity for Foreign Ministers. What the joint opinion very obviously does not do is enter into what I have called the actual conduct of states rather than formal arguments based upon the logical structures of legal propositions. For instance, where the Foreign Minister is engaged or is reasonably believed to be engaged in inciting genocide through public race hate speeches in his capacity as a leading state official, what possible international community interest can exist in facilitating his travel to other states? The possible response is that

the claims are spurious, manipulative, propaganda–based, etc. If the latter is not the case, other states should be engaged in taking concrete steps, including forcible, UN-authorized intervention, to overthrow the government of which he is a part. At the very least, the officials of his state should be banned from international travel. There are very many instances of such scenarios (e.g. Israel and Zimbabwe at the moment) which could have been considered by the joint opinion. It fails, as much as the majority opinion, to enter into a phenomenological, concrete analysis of the real tensions inherent in any genuine effort at balancing interests.

The dissenting opinion of the Belgian *ad hoc* Judge van den Wyngaert discerned how the pseudo-application of custom as a reflection of state practice could erase the very idea of balance of conflicting principles. The Court has, in effect, decided that there is evidence of a rule protecting the immunity of Foreign Ministers *and no evidence of departing from this in the case of war crimes or crimes against humanity* (para. 10; author's italics). The Court's approach, in fact, subordinates the interest in the latter to the interest in the former, when one would have imagined the idea of core crimes had a *ius cogens* character (para. 28). Instead, all the relevant international criminal law conventions affirm Principle 3 of the Nuremberg principles: 'The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible Government official does not relieve him from responsibility under international law' (para. 29).

The complete absence of evidence of immunity of Foreign Ministers should have meant that the Court could not apply its standard test for customary law, and the *Lotus* principle should have applied. Absence of prosecution of such ministers did not preclude Belgium from exercising the option (para. 13). Diplomats reside in the territory of the host state, while Foreign Ministers reside in the state where they exercise their functions (para. 15). Finally, in his 1989 ILC report, the Special Rapporteur on Jurisdictional Immunities of States said the privileges and immunities of Foreign Ministers were granted on a basis of comity and not law (para. 17). Indeed *male fide* governments could simply appoint suspects to senior cabinet positions to shield them from prosecution in third states (para. 21). The judges in the *Pinochet* case could see where this reasoning leads. Some crimes under international law (e.g. genocide, aggression), can only be committed with the means and mechanisms of a state. They cannot be other than official. Hitler's 'Final Solution' must be regarded as an

official act, deriving from the exercise of his functions as head of state (para. 36).

The *monstrous cacophony* argument, used by the Congo, is that if a state would prosecute members of foreign governments, etc. and without any point of linkage to domestic legal orders, there is a danger of political tensions (para. 87). However, in the present dispute, there was no allegation of abuse of process on the part of Belgium. The warrant was issued after two years of investigation and there were no allegations that the investigating judge who issued it acted on false factual evidence (para. 87). All cabinet ministers represent their countries in foreign meetings. The effect of the Court's decision is to increase hugely the number of persons who enjoy international jurisdictional immunity (ibid.).

3.B

In the final case, an advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* the Court was faced with the following argument from Israel. It was necessary to inquire into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response (para. 55). The Court responded that the UN Secretary General had prepared a dossier and Israel's concerns about security were published and in the public domain (para. 57). The Court determined that under customary international law, territory is considered occupied when it is actually placed under the authority of a hostile army. Israel has the status of an occupying power (para. 78).

The Court was able to determine, on the basis of the Secretary General's dossier, that when the wall was completed it would take up 16.6 per cent of the West Bank, home to 237,000 Palestinians, and almost completely encircle another 160,000 Palestinians. Nearly 320,000 Israeli settlers would be living in the area between the Green Line and the wall (para. 84). The territory between the Green Line and the wall has been declared a Closed Area and Palestinians may only remain there with a permit, while Israelis can move freely without one (para. 85).

The Court noted that the route of the wall as fixed by the Israeli government includes within its Closed Area some 80 per cent of the settlers living in the Occupied Palestinian Territory. The wall's sinuous route has been traced so as to include within that area the

great majority of the Israeli settlements (para. 119). As regards those settlements, the Court notes that Article 49/6 of the 4th Geneva Convention provides: 'The occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' That is, the settlements are illegal (para. 120). The construction of the wall and its associated regime create a *fait accompli* on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation (para. 121).

The Court notes that Article 53 of the 4th Geneva Convention provides that any destruction of real or personal property, by whomsoever owned, is prohibited, except where such destruction is rendered absolutely necessary by military operations (para. 126). Article 49 allows total or partial evacuation of a given area if the security of the population or imperative military reasons so demand (ibid.). The Court relied upon a UN Special Committee Report that an estimated 10,000 hectares of excellent agricultural land, and large amounts of private property, were destroyed. Fifty-one per cent of the West Bank's water resources have been annexed and communications necessary for schooling, economic life and health have been so disrupted as to make further Palestinian population movements inevitable (para. 133). The Court noted finally that the provisos of Articles 49 and 53 were not applicable. On the material before it, the Court is not convinced that the destructions carried out 'were rendered absolutely necessary by military operations . . .' (art. 53, para. 135). The Court also took the view that the measures taken were not justified as proportionate responses to the security situation in terms of abrogation of human rights under the UN Human Rights Covenants, although Israel does not accept that the Covenants are applicable at all (para. 136). So, to sum up, the Court says:

> from the material available to it, [it] is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order . . . (para. 137)

The Court also considered whether Israel could claim to exercise a right of self-defense under Article 51 of the UN Charter. It cites the article and comments that it recognizes the existence of an inherent

right of self-defense in the case of an armed attack by one state against another state.

> However, Israel does not claim that the attacks against it are imputable to a foreign state. The Court also notes that Israel exercises control in the occupied Palestinian territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory . . . (para. 138)

Finally, the Court considered whether Israel could, under customary law, invoke a state of necessity. This can be only on an exceptional basis, strictly defined, the state concerned not being the sole judge. The formula used is taken from Article 25 of the ILC draft articles on state responsibility, being 'the only way for the state to safeguard an essential interest against a grave and imminent peril.' Again, the Court said that in the light of the material before it, it was not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril, which it has invoked as justification for that construction (para. 140). Israel has to respond to numerous indiscriminate and deadly acts of violence against its civilian population, but only in conformity with international law (para. 141).

The American Judge Buergenthal dissented from the opinion of the Court. His primary reason for doing so was that the Court should have answered its own dictum in the *Western Sahara Case*: whether 'it had sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character . . .' (para. 1). He objected that the 'nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject . . .' (para. 3).

As for the possible Israeli right of self-defense, Buergenthal objected that Article 51 merely requires that there has been an armed attack and not that it has to come from a state. This has been recognized by the Security Council in the wake of September 11, 2001 (Res. 1368, 1373). Also, insofar as the Court regards the Green Line as dividing Israel proper from the Occupied Territories, the territory from which the attacks originate is not Israel. The question is then whether there is necessity and proportionality in the exercise of the

right of self-defense. 'the Court's formalistic approach to the right of self-defense enables it to avoid addressing the very issues that are at the heart of this case . . .' (para. 6).

The central part of Buergenthal's argument is that the Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies of national security. The Court says it 'is not convinced', but it fails to demonstrate why it is not convinced (para. 7). However, Buergenthal goes some way towards the Court's position. Private property may never be confiscated under Article 46 of the Hague Rules, but Israel offers compensation, and this is not considered (para. 8). Article 49/6 of the 4th Geneva Convention also allows no exception for military exigencies. The Israeli settlements are illegal. It follows that segments of the wall built to protect them are *ipso facto* in violation of humanitarian law. Moreover, the demonstrably great hardship which the wall causes the Palestinian population makes it seriously doubtful whether the standard of proportionality in self-defense has been satisfied (para. 9). Nonetheless, he remains of the view that the court lacked the relevant facts bearing on Israel's construction of the wall (para. 10). Therefore, the Court did not even begin to balance the two sides of the argument.

4

What is needed is a framework of analysis of state activity that allows a court to engage in effective analysis of the conduct of states as actors in international society. This entails actually lifting the corporate veil of the state in order to understand both facts and intentions. For some purposes this might not be strictly necessary, for example if the matter under observation is purely one of legal/state responsibility. Positions taken by governments would, then, be of more importance than understanding actions in contexts. However, investigation of customary practice is a matter of deciphering the normative significance of the behavior of collective entities and of evaluating, comparatively, clashing collective actions. As has been seen in the first part, doctrine has virtually talked its way into the position that somehow the very idea that states have intentions, minds, etc. is regarded as absurd. Instead, the notion of legal obligation of states is to be inferred from the results of their behavior, externally observed as a sort of material fact. As Akehurst put it some time ago: 'We cannot know what states believe. First of all states being abstractions or institutions do not have minds of their own; and in any case since much of the decision-making

within governments takes place in secret, we cannot know what states (or those who speak for them really think), but only what they say they think.'[32] It is possible to imagine what a purely materialist approach to conduct can mean. Philosophical sociology has grappled with the problem. Wittgenstein has called 'mentalism' the belief that subjective mental states cause actions. In other words, it is no less problematic to ask what are the intentions, the internal subjective state of an individual person, than it is to explore the activities of a collective entity. Instead, we merely ascribe motives in terms of public criteria which make behavior intelligible. Therefore, it is better for social scientists to eschew intentions as causes of actions and focus on the structures of shared knowledge which give them content.[33] Wittgensteinians say that, in the hypothetical court case, the jury can only judge the guilt of the defendant – having no direct access to his mind – by means of social rules of thumb to infer his motives from the situation (a history of conflict with the victim, something linking him to the crime scene, etc.). They go further and argue that the defendant's motives cannot be known apart from these rules of thumb and so there is no reason to treat the former as springs of action in the first place.[34]

However, it is possible to argue – and will be done so here – that no matter how much the meaning of an individual's thought is socially constructed, all that matters for explaining his behavior is how things seem to him. In any case, what is the mechanism by which culture moves a person's body, if not through the mind or the self: 'A purely constitutive analysis of intentionality is inherently static, giving us no sense of how agents and structures interact through time.'[35] Individuals have minds by virtue of independent brains and exist partially by virtue of their own thoughts. These give the self an 'auto-genetic' quality, and are the basis for what Mead calls the 'I,' an agent's sense of itself as a distinct locus of thought, choice, and activity: 'Without this self-constituting substrate, culture would have no raw material to exert its constitutive effects upon, nor could agents resist those effects.'[36]

When the present form of the subjective element of customary law came to be established in international law doctrine, international lawyers do not appear to have had a legal understanding of the state primarily as a corporate entity. It is the Swiss jurist Alphonse Rivier who is given the honor of being the first to employ the modern concept of *opinio juris* as an essential psychological element in his definition of general customary law.[37] This was at the end of the nineteenth century, in 1896. Rivier's own manual is based on a more

extensive review of sources and methods of law which he undertook with von Holtzendorff (first published in Berlin in 1884 and translated into French in 1887).[38] Both Rivier and von Holtzendorff fit firmly within the tradition of the historical school of law. The life of peoples is more powerful than written laws or legal doctrine, and the supreme goal of law is to return to custom, which provides a foundation beyond the disputations of treaties and doctrine.[39] In themselves treaties are usually diplomatic means to resolve particular uncertainties. They can be instructive as precedents, but they do no more than reflect on historical development and as such they are a poor reflection of the historical consciousness of peoples.[40]

In the next chapter there will be a more metaphysical exploration of the normative implications of the notion of historical consciousness for the constitution of states as legal subjects. Here the concern is more directly with the problems and possibilities of analysis of state practice, which the concept of general custom provokes. Rivier was one of the founders of the Institute of International Law in 1873 and he succeeded Rolin-Jaequemyns as its second Secretary General. His *Principes du droit des gens* was not, in his view, a digest of material but a guide to politicians and diplomats which aimed to draw out of the multiplicity of facts certain general and dependable principles and rules of law universally and habitually respected 'de façon á faire ressortir ce qu'il appelle 'la consience juridique des nations.'.[41] In the preface to the Serbian edition of his work, Rivier defined the task of the international jurist in terms that Jürgen Habermas has described as the classical liberal public space.[42] The juridical conscience of nations was precisely a liberal space of political rationality which independent academic lawyers could influence and help to direct. The task of jurists was:

> . . . de controller les actes des politiques et de les juger, non d'après un code arbitraire, mais du point de vue le plus élevé du juste et de l'injuste; il proclame que c'est abaisser le droit des gens envisagé comme science que de lui assigner le role passif d'un simple enregistrement et classification des faits internationaux; il affirme qu'il doit constamment s'inspirer des principles supéreurs de la morale, de la justice et de la fraternité.[43]

The founders of the Institute said that without the support of public opinion even the unanimity of men of science would be ineffective. That is not to say that they relied upon public opinion alone. There was a law of progress and there were the imperfections of human nature.[44] This means jurists have to state the juridical opinion of the

civilized world as clearly as possible, so that it can be accepted by states as regulating their relations.[45]

So, for the founders of the Institute the notion of general custom itself had to be understood in the wider context of liberal legality, which it was the function of jurists to uphold by their power of reasoning in public debate. In spite of the vicissitudes of politics, the society of fact existing between nations is becoming a society of law, because it is difficult for an individual or a state to confine its activities to its own territories. In these circumstances the rules of law are not merely a moral and scientific necessity, but also a political necessity of the first order.[46] Rivier says that states are independent, but that, in their autonomy, they adopt certain rules and submit to certain principles, whose necessity they recognize, this voluntary consent expressing itself in custom and treaties.[47] However voluntary it may be, the positive law is not merely changeable and relative. It is not arbitrary: 'Ses principes découlent des relations effectives des peuples, de l'ordre universel, tel que Dieu l'a créé et continue a le créer.'[48] In other words, peoples, nations, or whatever, are the center of international legal activity. Rivier is preoccupied with a law of peoples, a *droit des gens*, who exist in a morally significant global order created by God.

The international system is not a world federation. Nations retain their autonomy but must submit to the laws of justice. The Institute was set up by academic lawyers 'to serve as an organ for the legal opinion of the civilised world on the subject of international law.'[49] The ambition was to avoid the national bias which was possible with the continued independence of states, and to give expression to the elevated sentiment of law and to the conscience of humankind, which is not simply a product of the conduct of diplomats. The latter must respect first the instructions of their sovereigns. Thus they will not necessarily be able to direct themselves to an absolute rule of law beyond the particular interest of the nations they defend.[50] It is a liberal internationalism which assigns to the academic international lawyers the task of exploring the ethical sense of mankind. They must discover and make precise the rules of justice, morality, and fraternity which they recognize as having to be the basis of the relations that peoples have with one another.[51]

It might be wondered, even at this ascendant point of liberal internationalism, how international lawyers thought they could hope to direct or regulate the activities of powerful, centralized states. Even in the most democratic of states the Foreign Offices and Diplomatic Services continued to be staffed from a minute section of society.

Parliament and public opinion were not important, although they exercised influence at certain intervals. Foreign affairs were still the prerogative of a largely pre-bourgeois aristocratic class. They were reputedly still honorable men who really experienced a conflict of loyalties between the defense of their country and the claims of a common heritage and unity in the civilization of Europe.[52] What is incongruous about the growth of a bourgeois or liberal middle-class perspective on international law at this time is that the most distinctive feature of a continuing *ancien regime* was the secrecy with which international affairs were conducted.[53]

Nonetheless the picture is clear. Habermas explains that classical liberal political space was not the sole prerogative of state power, but belonged as well to civil society, which was the public interest as an 'affair' to which it might contribute with a public use of its reasoning powers.[54] This capacity for reasoned public debate was seen as rooted in the untrammeled subjectivity of the individual, protected by his economic independence and by the emotional privacy of his family.[55] For this notion of debate each participant is taken as a simple person without hierarchy or status, equality is assumed, and the laws of the market are suspended, to achieve a detachment beyond mere competitiveness.[56] Ideas of public reasoning were intimately related to the notion of conversation or dialogue. The independence of the individual conscience was decisive.[57] The very idea of 'humanity' in this liberal sense rested on free will, the intimacy of the family (i.e. free of compelling social constraints), and an independent intellectual culture.[58]

Such a notion of liberal political rationality is tied to a substantive view of legality. The constitutional state has to guarantee the connection between law and public opinion. The rule of law signifies the representation of the people. However, law is not simply an expression of the will of a particular group of people, but also a guarantee of a *ratio* which puts aside a dimension of domination, precisely because it is the outcome of a continuing spirit of public debate. Insofar as law is an expression of agreement based upon rational public discussion, the inevitable arbitrariness of actual laws has to be submitted to the constant pressure of public debate, so that a positive legal order cannot be seen as a static phenomenon. There must be a constant pressure to turn *voluntas* into *ratio*.[59] Clearly, there is presupposed the possibility that each person can attain the independence of property and culture which will permit a detached concern for the general public welfare. Once this public transforms itself into a

dominant class, reason will become dogma and opinion will become command. Nevertheless the bourgeois idea of legality remains that truth, not authority, makes law, and that liberal political rationality is able to untie the dominant force of group interest.[60]

Thus a critical spirit of Enlightenment does depend upon an intellectual class. They must be independent *vis-à-vis* the state and elaborate critical principles for their own sake. In Habermas's view it is to philosophy that one must look and not to law as such, in a narrower sense, or theology and medicine, all of which rest upon authority, erudition, and a certain supervision by the state.[61] There is by definition no hierarchy of rational authority; nor are professional demarcations clear. The general principles of bourgeois legality in question have to serve to remove, or at least to assuage, the element of command and domination in public life. This means a conflation of law and morality.[62] The task of public instruction then falls to what Kant calls, in his *Critique of the Faculties*, 'Professeurs de Droit libres,' which really presupposes an underlying pre-statist natural law.[63]

Where international lawyers style themselves on the intellectual class of the time of the founding of the Institute (1873) it is possible to imagine them engaging with issues such as foreign military invention (Nicaragua), nuclear deterrence, and the other cases in a more penetrating and creative way. States are in fact nations or peoples, with representatives who are bound by human laws of justice and fairness, the meaning and implications of which could be elaborated in concrete terms. The procrustean bed of the state need not appear and the international lawyer has no connection with the state. This allows the international lawyer as critical intellectual to ask about the history of US relations with the Samoza and then Sandinista regimes in Nicaragua. One might explore concretely the nature of the Contras who fought the Sandinistas. Again, who are the elements within the US political system that want to see a change in Nicaragua? What are the pretexts that the Sandinistas give for not holding elections? Principles of democracy, political independence, equality of peoples, human rights, freedom from arbitrary violence, the right to life of non-combatants, etc. – all these elements could be discursively developed by a critical, reflective intellectual class, which, by definition, remains open and non-hierarchical. The same could be said of the dilemmas of nuclear defense, of the moral confusion of an international political class steeped in political violence, and of the desperate conflict between the Palestinians and Israelis. These controversies can be made concrete, conceptualized, and, most of all, be attributable to

particular individuals and groups, through a history of their motives, intentions, and actions.

Instead one appears to be faced with a paralysis of reflective intellect and moral sense. The Court is an inter-state institution, only states and UN bodies can appear before it, and its judges are state-nominated. Of such elements Habermas suggests a not very promising political sociology. These are very hard words, but it is high time to stop being surprised at the hopelessness of the deliberations of the ICJ and look in other directions. The symbiotic relationship of the 'state' lawyer to inter-state law is well up summed by Habermas in his assertion that the loss of independence of the intellectual is rooted in both the loss of a private, interior life and in the exclusion from active, in the sense of spontaneous, participation in public life.[64] A process of 'disinteriorization' is the converse of the social absorption by an all-embracing state regulatory apparatus.[65] An independent critical standard becomes inconceivable as a matter of the sociology of knowledge. Habermas draws a sharp contrast between the private culture of the traditional bourgeois, who engages in independent integration of material, and the 'ready-made' debate furnished by the mass media, in which the vast majority can participate only at a voyeuristic level that cannot possibly unpack the rigid social structures of modern society. Such public debate becomes one more form of production and consumption, which will inevitably obey its own laws of the social market, without necessarily having any impact on the rest of the system.[66] Public discussion takes the form of fabricating an acclamatory consensus as a passive social response and is a far cry from the Enlightenment ideal of civil society as the foundation for independently directed criticism of public power. Such a picture cannot survive the totally integrative function of the production-consumption cycle of the social market.[67]

Power is now transferred to groupings, whether public or private, whose interests are reflected in attitudes, and which use publicity, the mediation of pre-digested views, as part of a bargaining process, where 'consensus' reflects what a traditional liberal rationalist would regard as a stalemate or a standoff. If there is a 'real' debate, it is secretive and takes place within these groupings.[68] The public sphere is refeudalized by formalistic acts of self-representation by these groupings, struggling for prestige and reputation.[69] It is precisely these groups, e.g. Israeli state security interests, nuclear deterrence states, communist regimes in Central America, which produce, in the public domain, standoffs in terms of struggling self-representations, that the

state officials who are judges, or advocates of states, can merely reproduce, select arbitrarily, or allow to cancel out against one another.

A way out of the impasse, which Habermas considers, is to create further institutions, which might undertake the task of publicizing and popularizing the opinions of an elite, qualified by a special level of intelligence and information. This is openly to sacrifice universality in order to retain rationality,[70] a form of government by expert opinion or 'doctrine.' Such institutions could embrace governmental commissions, the secretariats of unions, the 'quality' press. The difficulty is that they do not amount to public debate in the classical liberal sense because there is no relationship of reciprocity between them and the general, unorganized mass of the population. They owe their profile to a prior conferring of privilege by institutions.[71] The only fragmentary public debate which is still possible is between persons who are 'private' intellectuals in the classical liberal sense and the members of those social groups or institutions which are willing to permit their internal structures to function on a basis of democratic discussion.[72]

Translated into the terms of international law and doctrinal or judicial reflection, this program means one will have to confront and attempt to enter into dialogue with a variety of quasi-official, ready-made discourses, rather than imagine that there is a single 'state' discourse which is authoritative and which can influence or even merely absorb and reproduce. The orthodox criteria for the identification of law – general custom and treaty practice – cannot yield the type of objective, critical legal standard set by the founders of the Institute. There is no single authoritative monologue to which the legal profession can listen, any more than that there is a possibility of universalized rational public discourse. All that remains of the classical paradigm of the Institute is the illusion that the methodology of international law can refer to a single, global, thinking public, with a conscience to which appeal can be made in the form of rational debate and, through a scientific distilling of the essentials of the debate, one can recover single, authoritative legal answers still somehow addressed by everyone to everyone.

The issue of sources is acutely interrelated to that of the subject of law, primarily the so-called statehood in international law. This will become the theme of the next chapter. However, here an outline, by way of conclusion, is necessary to demonstrate where the international lawyer actually finds himself. The classical analytical-empirical definition of the state as a territory, with an population and a government

in control, which is seen as a corporate entity capable of engaging responsibility, has its uses, as already indicated. However, it needs to be completed with an historical understanding of how concrete, namely particular, states have been constructed and also, vitally, there is a need for a dimension of self-awareness and self-understanding of such collective entities, however limited. This means abandoning abstractions of statehood for a political sociology of democratic, historical nations – at least for the West and much of Asia – which function as collective systems of epistemological reference. They have inherited traditions, prejudices, strivings, etc. which all contribute to the style and content of their behavior. There can be no search for a unitary state-will, but rather an at least heuristic acceptance of a psychosocial collectivity as a framework in which to pursue concrete individual behavior in both reflective and unreflective forms. At most the 'state' may be regarded as an institutional framework for the numerous subordinate institutions within which individuals, including international law officials, work with – and against – others to achieve certain aims with more or less conscious intentions.[73] The conclusion, in terms of Habermas's theory of institutional rationality, is that the most that exists for international law and lawyers is the international law departments of states, their interaction with the academic community and with the judiciary, both national and international. They are limited forms of government by expert opinion that sacrifice universality (vital to democracy) for a limited expression of rationality. While they will suffer all the constraints already identified, they do provide material for analysis and reflection.

It is worthwhile to ask, in a particular case, whether a state's actions are motivated by legal considerations among others. Whether this is the case is simply a matter of assessing whether significant state officials acted in terms that were understood subjectively to be formulated legally.[74] That is to say, the officials considered they were acting as they were legally entitled or bound to do. This is matter of evidence and the evidence is in the archives, the internal history of various state institutions. If states have, as collective entities, an idea of obligation, it can only come from an ethnological background, a common historical, by its nature almost entirely unreflective, consciousness. Much more will have to be said about this in chapters 3, 5, 7 and 8 of this book.[75] The actual practice of inter-state international law is bound up, ethnologically, with a closeness to particular national institutions, which determine the meaning of obligations, which need interpretation. It is too simple to say that states, as

sovereigns, give words meanings that suit state interests. However, a political sociology, following Habermas, does not deny any dimension of institutional intentionality or any measure of normative behavior at any levels within the state. The latter is seen here as a framework for numerous subordinate sub-institutions providing textual or interpretative communities within which international law officials work with others towards certain aims.

It may be that in a particular case the lawyers are the determining voice, so that to understand the outcome as human action it is only necessary to trace the intentions of the lawyers and how they came to be adopted. However, more usually the work of the international lawyer officials will be entwined in a complex of attitudes and expectations also held by those who are not lawyers. It is the sheer complexity of the relationships which exist that make it so difficult to be categorical that the language of legal duty is the most appropriate way to describe action eventually agreed upon. In ethnographic terms, the assumption is being made that law really exists within a web of tacit understandings and agreements among and within a number of states whose meaning cannot be unraveled without regard to the interaction of the intentions and expectations of diplomats, politicians, and lawyers. The international law practice of a state, so far as any of the state's institutional practice has a rational, consciously thought-out dimension, will exist alongside other standards, ethical, political, or whatever, which together make up the ethos which permeates the context in which all of the state officials, including elected politicians, work. This much can be studied with the tools of diplomatic history relying primarily on archives and with the tools of contemporary history and investigative journalism, which are also capable of extensive penetration of the corporate veil of the state.

With these qualifications, it is possible to give intellectual credibility to the empirical study of state practice to see whether and how far it has been motivated by the desire to observe or to create law. The historical school's approach to law becomes an ethnography of, for the most part, sub-institutions of the state. This leaves intact theoretically Habermas's critique that the state, taken as a collective entity, cannot be studied simply in terms of the normative significance of its actions on the assumption that they have a unitary source. An international law, rooted in practice, must have a much more comprehensive picture of the nature of the state as an expression of brute force, unconsciously exercised tradition and prejudice, as well as blind, fragmented confusion. The boundary line between the reflective/rational – in which law

may play a part – and the rest is always problematic and should be the object of the idealist international lawyer to contest.

Appendix: Archival Analysis of the Practice of states in Relation to the 1957 Oman and Muscat Incident, and the Place of Legal Advisors in Shaping the Presentation of Issues

Introduction

The international lawyer, as much as the diplomatic historian, needs to understand state conduct and this means having reliable access to state intentions. These remain, in principle, state secrets except insofar as the state itself chooses to disclose them, or when recalcitrant officials leak them, or journalists otherwise come improperly or irregularly on state intentions. There is a second, equally important problem, especially concerning the analysis of contemporary events, and that is to know whether one can be sure of the factual circumstances which are supposed to justify the invocation of a norm. Based on archival records in the UK Foreign Office (FO), which are here revealed for the first time, this appendix focuses on the active FO discussions in July and August 1957 about the best way to present the UK's relations with Oman and Muscat internationally, when an Arab bloc of states, led by Egypt, tried to place (what it called) UK armed aggression against Oman on the agenda of the Security Council. The legal advice of Francis Vallat and Sir Gerald Fitzmaurice played a considerable part in these discussions which reveal a vision of governmental structures for dealing with international relations which appear very much a hangover from the period of the High Renaissance. Secrecy is prized as the most reasonable option when it comes to providing public explanations of state conduct. Without consistent and comprehensive access to the governmental policymaking process in which government international lawyers may also have a significant input, it is impossible to assess the process of decision-making in such a way as to determine exactly how international law is being interpreted, applied, followed, or ignored.

State practice

It is very difficult to discuss contemporaneous events for a number of reasons. The main one is the fact that those involved are usually still alive and may continue to be engaged in the very same events that are

ongoing. Perspectives and opinions about the best course of action will remain openly contested. Furthermore, there will not usually be agreed objective and detached sources from which one can draw to determine the nature of the events. There will be much fresh, first-hand testimony, but it will be conflicting. Where official events are concerned, and state practice falls under this rubric, there will not be direct access to primary source material, and indeed it may be wondered whether the very idea of primary source material itself is becoming archaic in the postmodern age of political spin. Contemporary events will be important to those still engaged and passions will run high in attempting to discuss them. At the same time the objective, detached, perhaps officially agreed records for the description of the events will not be available and there will be no final authority to adjudicate contesting versions of the events.

All of this impinges directly on the practice of the international lawyer in at least two respects. The international lawyer, as much as the diplomatic historian, needs to understand state conduct and this means having reliable access to state intentions. These remain, in principle, state secrets except insofar as the state itself chooses to disclose them, or when recalcitrant officials leak them, or journalists otherwise come improperly or irregularly on state intentions. Such well-known problems pose for the theory of state practice the temptation to avoid the psychological or intentional element of state practice when collecting and analyzing it. I suggest that it is a remedy a lot worse than the disease.

There is a second, equally important problem with the analysis of contemporary events in which states participate, and that is to know whether one can be sure of the factual circumstances which are supposed to justify the invocation of a norm. Perhaps the most usual example is where a state alleges that it has intelligence information (which it cannot disclose for fear of endangering sources, etc.) that another country constitutes an imminent threat, justifying pre-emptive actions.

International Law is supposedly based upon the practice of states. Whether this is simply a matter of assessing the development of a new rule of general customary law or more specifically a matter of assessing the attitude of a particular state to the application of the evolving law to itself, orthodox doctrine still supposes that the practice will have two elements: the material practice of the state and a psychological element which evidences the intention of the state and the way in which it makes clear whether it is following a rule, or somehow

creating a rule as a matter of legal obligation. Therefore, in principle, the international legal practitioner should expect to become embroiled in all the problems of contemporary history writing.[76]

An authoritative recent representation of the debates about the two elements which make up customary law, material practice, and the subjective element, is Mendelson's 'The Subjective Element in Customary International Law.'[77] He raises the important question of whether, in order to assess the subjective element of custom, it is necessary to know the inner workings of a state bureaucracy. States do not have minds of their own,

> and in any case, since much of the decision making within government bureaucracies takes place in secret, we cannot know what states (or those who direct or speak for them) really think, but only what they say they think. There may be something of an exaggeration here. In some instances we can discover their views because the opinions of their legal advisers or governments are published. [Footnote: Though admittedly this is done only on a partial and selective basis and often only long after the event; and though it must also be conceded that the opinion of a government legal adviser does not invariably become that of the government . . .]

After these important deliberations, Mendelson writes that it is better to speak of the subjective rather than the psychological element of custom:

> for it is more a question of the positions taken by the organs of states about international law, in their internal processes [Footnote: Including the communications of governments to national legislatures and courts, and the express or implicit *prise de position* about rules of international law by national courts and legislatures in the exercise of their functions] and in their interaction with other states, than of their beliefs.[78]

The *United Kingdom Materials on International Law* (until recently, edited by the late Geoffrey Marston) have been available in the *British Yearbook* annually since 1978. Marston has followed what is called the Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law, adopted by the Committee of Ministers of the Council of Europe in its Resolution (68)17 of June 28, 1968. This was amended by Recommendation (97)11 of June 12, 1997, following General Assembly Resolution 2099(XX) on technical assistance to promote the teaching, study, dissemination, etc. of international law. The changes are not significant, and the essence of Marston's approach is

that he sets out, as Mendelson has put it, 'positions taken by organs of states about international law, in their internal processes and in their interaction with other states . . .'[79]

What will be attempted here is an analysis of the implications of these activities with respect to a single significant issue, the use of force by Britain in international relations, with respect to one incident as offering a pivotal precedent, the Oman and Muscat Incident of 1957, and the rule of international law with respect to intervention in a country at the request of its government. However, before considering the case study in some detail, some general remarks can be made about the significance of penetrating the bowels of the state. In strict legal terms, the issue can arise in distinct ways. It may be a matter of determining whether Britain is observing or violating a rule of law. Alternatively, this may be a matter of assessing what contribution Britain is making to the development or clarification of the law, where it is taken to be uncertain. In either case, it is not enough simply to know what verbal positions British state organs take up. It is necessary to know what Britain has actually done. The discrepancy will arise where the British positions are either not true or not the whole truth. But it need not even be so black and white morally. It may simply be that without the full picture, the actions of a state, such as the UK, may be unintelligible.

The practical requirement of secrecy

In an article published in 1986, a Foreign and Commonwealth Office (FCO) Legal Advisor drew attention to the fact that 'informal agreements' played a large part in British foreign relations.[80] The basic principle is that a state is free to deny itself the advantages of concluding a legally binding treaty in order to benefit from the advantages of concluding informal instruments. Security and defense issues are not the only issues covered, but it is clear that the advantage here is the flexibility which comes from secrecy. This background will usually be relevant to cases involving the use of force, as there will be agreements between the UK and its allies that are not public knowledge, or there may be relevant agreements even if the UK is not itself formally a party to them. This was the case with Oman and Muscat in 1957.

To present the issue in a wider context, one might take a well-known and still uncertain case, the US bombing of Libya in 1986 from bases within the UK. The terms under which the US enjoys the

use of military bases within the UK are known to be the subject of informal agreements or even understandings. With the US bombing of Libya from British territory, one question was whether the UK had the full legal power to permit the US action. The UK did not try to claim that the US had acted independently of it, but supported US action, again relying upon undisclosable intelligence information that there were very specific Libyan targets engaged in terrorist activity. The information could not be disclosed for fear of jeopardizing sources. The Prime Minister, Margaret Thatcher, in an emergency debate in the House of Commons on April 16, 1986, affirmed that her legal advice was that the bombing targets chosen were permitted by Article 51 of the UN Charter, as a matter of an inherent right of self-defense against armed attack.[81]

It was argued, however, in the House of Commons debate, that Thatcher should be obliged to demonstrate, with relevant evidence before the Security Council, that Article 51 had been observed. This would mean producing concrete evidence that, at the least, without an air strike there would be planned raids from specific camps, putting British citizens at risk. The Foreign Secretary, Sir Geoffrey Howe, himself a QC, argued in reply that the right of self-defense includes the right to destroy or weaken one's assailants, to reduce his resources, and to weaken his will so as to discourage and prevent further violence.

Howe's argument was, to repeat the point, presented in a context where the information which was supposed to ground the threat or risk and the justification for military action could not be disclosed because it would jeopardize sources of intelligence information. There was effectively a claim to determine unilaterally the scope of international obligations with respect to restraint on the use of force, not only with respect to the extent of the norm but also the factual context of its application.

Such resort to arguments about the necessity of state secrets leaves the UK open to the types of charges levied against it in works such as Curtis's *The Ambiguities of Power* and the successor volume, *The Great Deception: Anglo-American Power and World Order*.[82] Curtis's view is that Britain has a clear foreign policy aim, which it follows in concert with the United States. This aim is to preserve as much as it can of the economic, political, and military advantages, which it possessed at the time of the Empire. In his analysis, Britain continues to be largely successful in the pursuit of this policy in the Middle East, especially in the Gulf, and in Southeast Asia. Military

interventions, whether covert or open, and support for friendly regimes, particularly military and other security training, will be attuned to the need to preserve these interests. Obviously, the language of international law is a potentially useful propaganda weapon in the hands of opponents, and so no useful purpose is served by an explicit and provocative disregard of it.

Therefore the British rhetoric is one of continued commitment to the principles of the UN Charter, above all, non-intervention in the internal affairs of other countries, respect for human rights and democracy, and priority to the peaceful settlement of disputes. Positions in accordance with these principles will be declared in international fora and even in public debates within national fora. The actual practice is difficult to put together because it remains largely secret and one obtains only sporadic glimpses of it.

Implications for the development of customary law on the use of force: the example of Oman and Muscat (1957)

What are the implications of these polemics for attempts to assess what contribution Britain is making to the development of international customary law on the law relating to the use of force and the right of intervention at the behest of a friendly government? For instance, the 1986 *United Kingdom Materials on International Law* contain a document produced by the Planning Staff of the FCO in July 1984, entitled 'Is Intervention Ever Justified?'[83] The question is how, or even whether, such a document is to be read critically, that is how to assess the relationship of the document to an inevitably largely hidden practice. For instance, in paragraph II.6, intervention under a treaty with, or at the invitation of, another state is mentioned. If one state requests assistance from another, then clearly that intervention cannot be dictatorial and is therefore not unlawful. In 1976, the Security Council recalled that it is the inherent right of every state, in the exercise of its sovereignty, to request assistance from any other state or group of states. An example of such lawful intervention at the request of states might be the British aid to Muscat and Oman.

Curtis comments on this incident as follows. Oman requested British military aid to quell a revolt in the north of the territory in the summer of 1957. In fact, in Curtis's view, Oman was a *de facto* client state controlled by Britain as much as any former colony. Its armed forces were commanded by British officers under the overall control of a British general. The Ministries of Finance and Petroleum

respectively and the Director of the Intelligence Service were British. Banking and the oil company management were controlled by the British. The country was desperately poor, with infant mortality at 75 per cent. The Royal Air Force and the Special Air Service together struggled until 1959 to put down a revolt against these conditions. Oman continued after its suppression to serve British financial and other interests very well. Extensive bombing of villages was an integral part of this campaign. At one point, the British Political Resident recommended that the villages should be warned that unless they surrendered the ring leaders, they would be destroyed one by one, etc.[84]

The FCO paper fully recognizes the complexity and controversy surrounding this area of law. It continues, on mentioning Oman in 1957, to say in paragraph II.7 that international law does prohibit interference (except maybe humanitarian) when a civil war is taking place and control of the state's territory is divided between warring parties. At the same time, the paper claims that it is widely accepted that outside interference in favor of one party to the struggle permits counter-intervention on behalf of the other, as happened recently in Angola.

Before considering what a closer examination of the archives might reveal about the Oman Incident, it might be interesting to consider some reactions in the academic community to Curtis's work. The reception of *The Great Deception* in a review in *International Affairs* is pointed. It begins: 'This book does not explain, so much as to seek to condemn . . .' Curtis supposedly implores his readers to extricate themselves from the view of establishment scholarship which includes the vast majority of academics. One might imagine Curtis scouring the archives looking for evidence to incriminate British and American policymakers. He often refers to his earlier book, *The Ambiguities of Power*, where the sources are often personal recollections or references to secondary works. If his sources are so accessible, why then have only a tiny minority of scholars been able to see the story this way. The reviewer concludes by exhorting Curtis to 'be more measured in his judgments, show more sensitivity to complexities and moral dilemmas that confront policy-makers, and offer some more viable alternatives to the policies he so roundly condemns . . .'[85]

There was a very full discussion within the Foreign Office in July and August 1957 about the best way to present the UK's relations with Oman and Muscat internationally, when an Arab bloc of states, led by Egypt, tried to have what it called UK armed aggression against Oman placed on the agenda of the Security Council. Legal advice by

Sir Gerald Fitzmaurice and Francis Vallat played a considerable part. The Foreign Office was reacting to arguments put forward in a particular context, a UN forum. Arab states, backed by the Soviet Union, wanted to have British military action in the Sultanate characterized in UN Charter language as constituting aggression against the independent state of Oman, coming from British forces in Muscat.

Fitzmaurice's and Vallat's legal advice

The advice from Vallat for the benefit of the Secretary of State was that intervention, at the request of the Sultan of Muscat, to put down an insurrection by tribes in Oman was legal. Intervention is wrongful, but that only refers to dictatorial interference, not assistance or co-operation. Oppenheim gives numerous examples of military assistance to maintain internal order, including Portugal in 1826, Austria in 1849, Cuba in 1917, and Nicaragua in 1926–27.[86]

Fitzmaurice is more explicit about the importance of the status of Muscat and Oman. Oman is not an independent state. In the international legal sense, it is not a state at all, but merely part of Muscat and Oman. The Imam of Oman exercised no territorial sovereignty. There are no frontiers between Oman and any other state or between Oman and Muscat. An agreement, known as the Sib Agreement, was reached in 1920. During the negotiations in 1920, a request for independence was completely rejected. The Sib Agreement worked well until 1954. The Sultan's sovereignty was recognized by the Imam, in that external affairs remained in the hands of the Sultan, i.e. concerning individuals and their lawsuits with foreign administrations. The Imam's adherents relied upon passports issued by the Sultanate. Judgments of the Muscat Appellate Court were accepted in the interior. An attempt to assert independence in 1954 failed. No state had regarded 'Oman' as a sovereign state independent of Muscat until the Saudi and Egyptian intrigues, which followed a Saudi incursion into neighboring Buraimi in 1952.[87]

This presentation of the situation was successful when the UK argued it before the Security Council. Sir Pierson Dixon mirrored the legal advice closely. There could be no aggression against the independent state of Oman because none existed. The sovereignty of the Sultan of Muscat and Oman over both had been recognized since the nineteenth century. Egypt and other countries claim that the independence of Oman was reaffirmed in the 1920 Treaty of Sib. This Treaty granted the tribes of the interior a certain autonomy but did

not recognize Oman as an independent state. This request was refused by the Sultan. Also, the agreement was not a treaty, but merely an agreement between the Sultan and his subjects. Sir Pierson Dixon followed Fitzmaurice's line very closely about the later marks of sovereignty. He concluded by saying the UK's action in supporting the legitimate government of Muscat and Oman had been in the interests of stability of this area. If the subversion there had not been checked, the consequences might have been felt beyond the Sultanate and would not have been to the advantage of any of the countries in the region that signed the letter to place this issue on the agenda of the Security Council.[88]

The vote against putting the matter on the agenda was five to four, with two abstentions.[89] Only the Philippines denied the legality of an intervention at a request of a government. The Soviet Union confined itself to generalities about the oppression of the national liberation movement of the Oman people. There was little stress on the argument about outside intervention in Oman, except from France, which led the vote against adopting the Arab item on the Security Council agenda. The UK itself played it down because it did not want to worsen its relations with Saudi Arabia.[90] An item to this effect was circulated to all the British embassies in the Middle East. Although the UK knew of the Saudi involvement, a higher priority had to be given to drawing Saudi Arabia out of the Soviet and Egyptian sphere of political influence.[91] This goal would have been lost if one had entered into specific detail about Saudi subversive activities. Instead, the legality of a response to an invitation for assistance was stressed.

At the same time Ehili Lauterpacht gave a full account of the events in the *International and Comparative Law Quarterly*.[92] The account reproduced a statement by the Foreign Secretary in the House of Commons in July 1957. It followed the same lines as Sir Pierson Dixon's UN presentation, stressing the invitation from the Sultan. He emphasized the importance for Britain's reputation in the region, that it responded to its implicit obligation to protect the rulers of sheikdoms under British protection from attack. There was a direct British interest and the House did not need to have stressed the importance of the Persian Gulf. The fact that dissidents had received assistance from outside the territories of the Sultan was briefly mentioned. The Joint Under-Secretary of State at the Foreign Office also made a statement concerning the right to send arms to support a ruler upon invitation. The UN had not been informed directly because it

was an internal matter. Finally, a note was sent to the Soviet government. The latter alleged Britain had recognized the independence of Oman in an agreement and had now invaded the territory of Oman and evaded responsibility for this aggression by blocking discussion at the UN. The British response was that the district of Oman had been an integral part of the dominions of the Sultan of Muscat and Oman since the middle of the eighteenth century and had been recognized as such in a number of treaties between the Sultan and foreign powers. The UK's action was a response to a direct request on the occasion of an internal uprising stimulated from outside the country. There was no question of UK aggression against Oman and, of course, it had never recognized the independence of the Oman area in any treaty.

Lauterpacht himself offered an extensive note on the law on intervention, suggesting a limit to the right to intervene by invitation where a revolt had reached the point of intensity that recognition of belligerency would be permissible. He commented briefly from the answers in the House of Commons that the insurgents did not represent any substantial dissentient proportion of the inhabitants of the area subject to the rule of the Sultan and that, in any event, they were stimulated and supported in their rebellion by foreign elements. Lauterpacht finally reiterated the international treaty practice evidencing the Sultanate's independence. However, he did add two points. In an agreement in 1891, the Sultan pledged not to alienate his dominions save to the British government, thereby giving the latter a direct interest in anything affecting the territorial integrity of the Sultanate. Lauterpacht concluded, further, that its independence was in no way compromised by the undertaking of the Sultan, given in 1923, that he would not grant permission for the exploitation of petroleum in his territory 'without consulting the Political Agent at Muscat and without the approval of the High Government of India.' In a footnote, Lauterpacht remarked that the rights under this agreement cannot properly be said to have lapsed with India's independence. Nor can it be said that India succeeded to these rights. The term 'Government of India' was a mere administrative convenience.

Pressure for public disclosure: Sir Ronald Wingate's Counsel

However, further pressure was exerted on the Foreign Office from a quite different source: the domestic media, in particular an article in the *Guardian* of August 7, 1957. Pressure grew within the UK, in the

media, and through questions in Parliament, to uncover what the exact relationship between the government and the Sultan of Muscat and Oman was. Here, the picture which emerged in Foreign Office discussions was quite different from the public face at the UN. A focus for discussion was whether to publish the Sib Agreement which appeared to define the relations within the Sultanate. This was thought inadvisable, as the more the history and operation of the agreement were explored, the clearer it would become that the only coherence and stability that the Sultanate enjoyed came from British support at every level. The British Political Agent, now Sir Ronald Wingate, who had effectively written both sides of that Agreement, was still alive in 1957.

In September 1957, Sir Ronald came to see officials in the Foreign Office. He explained to them, in particular a Mr Walmsley, that the Western concept of sovereignty was meaningless in the region. The Walis, whom the Sultan maintained in Oman, did nothing and could not be said to constitute a token of government. The entire Sultanate of Muscat and Oman was, for all practical purposes, not administered. The situation there in 1954, as in 1920, could be compared to the Scottish Highlands before 1745. The Sultan was completely dependent on Britain and powerless outside a few coastal towns. Wingate commented upon a copy of Dixon's speech to the Security Council. He said that he could see nothing wrong with it, except that he would have expressed himself more frankly. The immediate comment of Walmsley was that while one might speak reasonably to reasonable people, it was impossible to concede any point unnecessarily in the UN.[93]

Wingate made a further detailed comment on the Agreement of Sib and Sir Pierson Dixon's speech. Treaties concluded by the Sultan did not mean he had any effective sovereignty over an undefined area. His power had always extended only to a few coastal towns and it would be impossible to hold that the Sultan exercised any sovereignty over the interior between 1913 and 1955. Indeed the interior tribesmen, who hated the Sultan, could have driven him into the sea had it not been for a strong battalion of imperial troops. This policy cost the UK a lot and served no purpose. It had been there in the nineteenth century to keep the French out and to stop the slave trade. Both reasons were long defunct. In 1920, Wingate, as Political Agent, undertook to reorganize the Sultanate, putting Egyptian personnel in charge of administration. Wingate, and not the Sultan, refused to acknowledge the independence of Oman. He refused

to recognize the Imam of Oman as Imam because of the religious significance of such an act. It would have given the Imam authority over the whole Sultanate. However, the Imam remained as head of the tribal confederation. The agreement recognized the facts of the situation in a way that permitted Muscat and the coastal Oman on the one side, and the tribes of the interior Oman on the other, to exist as separate self-governing units. No question of allegiance to the Sultan arose. What the Sultan did in 1955 was not to reassert his authority but to take over the interior by armed force. This could be justified as necessary for the security of the coastal regions. However, one also had to be careful about how to deal with the extraordinary rise in the Sultan's revenues, derived, presumably, from oil exploration rights which he had granted in the interior tribal areas, and which necessitated the provision of security for the drilling parties in the tribal territories.[94]

Wingate's comments were relevant to the advisability of publishing the Sib Agreement as a way of silencing British media controversy about the status of the Sultan, in particular the article in the *Guardian* of August 7, 1957. It was thought that, on balance, publication would merely show how uncertain the situation in Muscat and Oman was, although selected journalists were shown the agreement on a confidential basis. A further detailed internal FO reading of the Sib Agreement revealed that it was difficult to use. The difficulty was that it made no mention of sovereignty for either side, so officials reasoned that they would have to elaborate a thesis that the Sultan's authority was implicitly assumed and that the burden of proof would be on Omanites to show they had any corresponding sovereignty. The whole question was that much more prickly because of a British Administration Report which appeared on an FO Confidential Print on the Buraimi: 'The Agreement of Sib virtually establishes two states, the coast under the Sultan, and the interior, that is Oman proper, under the rule of the Imam . . . The tribes and tribal leaders having attained in their own eyes complete independence . . .'.[95] The best one could make of this would be to stress the words 'virtually' and 'in their own eyes.' The Sultan's interpretation of this agreement was equally valid. There was a consensus that this was also the direction of Wingate's commentary.[96]

A further difficulty is that while Wingate's report as Political Agent states categorically that the demand for the independence of Oman was refused, it also makes a number of uncomfortable points, if one had to rely upon it by publishing it. He denigrated the unparalleled

degree of ineptitude of the Sultan and even worse, his despatch made the following 'acid remarks' on British policy:

> Our influence has been entirely self-interested, has paid no regard to the peculiar political and social conditions of the country and its rulers and by bribing effete Sultans to enforce unpalatable measures which benefited none but ourselves, and permitting them to rule without protest, has done more to alienate the interior and to prevent the Sultans from re-establishing their authority than all the rest put together . . .[97]

One might try to say that the Agreement had been violated and ceased to exist by virtue of the subversion coming from Oman, and so it was quite pointless to produce it. However, if one attempts to argue that the balance of the Agreement has been destroyed by the aggression of the Imam Ghalib and treats the Agreement as no longer valid, to do this 'we should have to explain how completely he was in the pocket of the Saudis, and this would conflict with the Secretary of State's decision that at present we must avoid attacking the Saudi Government over Oman . . .'[98]

Therefore, it can be argued that in 1957 the senior FO officials did not think that there was any realistic way in which they could present publicly what they understood to be happening in the Sultanate of Muscat and Oman, other than in the Charter language of friendly states and supporting internal order within them. In fact, there was no state other than what Britain undertook to maintain, but the alternative would be for Saudi Arabia, Egypt, and eventually the Soviet Union to occupy a space if Britain were to vacate it. Dorril explains at length that further insurgency against the Sultan in the late 1960s convinced the Wilson government of the need for change, and the Conservative government gave the go-ahead at the end of June 1970. It was agreed to replace the Sultan with his English-educated and more competent son. It still took until 1975 to defeat Chinese- and Soviet-backed insurgency.[99]

It is ironical that the assessments of Curtis and Dorril, that the Sultanate was so misgoverned in the years before the 1970 *coup*, are part of the implicitly official UK view of that period from the hindsight of post-*coup* developments. The two authors rely upon much secondary evidence, as the Chatham House reviewer complains, but the secondary evidence is a book titled *Oman: The Making of a Modern state*, by John Townsend and published in 1977.[100] Townsend was economic advisor to the Oman government from 1972 to 1975. Curtis quotes him as arguing that, after the regime

change, the Sultan's response to the rebels in the 1960s was not an alternative program with proposals for reform or economic assistance, but simply the use of even greater force.[101] By 1970, that policy promised to lose the Sultanate to communist-backed forces. This was not acceptable. Furthermore, with the Shell-owned Petroleum Development (Oman) oil company producing oil in commercial quantities by 1967, there was plenty of domestic revenue to allow scope for a more pragmatic social policy.

The international lawyers perplexity

For the perplexed international lawyer, the question that is most pressing is whether and how the Charter paradigm and language for the analysis and understanding of international society can retain not merely formal validity but also a significant impact upon the forces at work in that society. Perhaps the least that one can say as an international lawyer is that positions taken up by the UK, or for that matter any other government, cannot be taken at face value, or even be treated with anything other than complete skepticism. Without consistent and comprehensive access to the governmental policymaking process in which government international lawyers may also have a significant input, it is impossible to assess the process of decision-making in such a way as to determine exactly how international law is being interpreted, applied, followed, or ignored.

The difficulty has already been seen to lie in part with the continuing and presumably inevitable secrecy of diplomacy where strategic interests are engaged. This is, in effect, to acquiesce to the vision that governmental structures for dealing with international relations remain a hangover from the period of the High Renaissance. A typology of this world is provided by Jens Bartelson in *A Genealogy of Sovereignty*.[102] The so-called modern state arising out of the wars of religion of the sixteenth and seventeenth centuries is traumatized by its bloody foundation and hence silent about its origins. It becomes the subject of Descartes' distinction between the immaterial subject and the material reality which it observes, classifies, and analyses. Knowledge supposes a subject and this subject, for international relations, is the Hobbesian sovereign who is not named, but names, is not observed, but observes, a mystery for whom everything must be transparent. The problem of knowledge is the problem of security, which is attained through rational control and analysis. Self-understanding is limited to an analysis of the extent of the power of the sovereign,

measured geopolitically. Other sovereigns are not unknown 'others' in the anthropological sense, but simply 'enemies,' opponents with conflicting interests whose behaviour can and should be calculated.

So, mutual recognition by sovereigns does not imply acceptance of a common international order, but merely a limited measure of mutual construction of identity resting upon an awareness of sameness, an analytical recognition of factual, territorial separation. The primary definition of state interest is not a search for resemblances or affinities, but a matter of knowing how to conduct one's own affairs, while hindering those of others. Interest is a concept of a collection of primary, unknowable, self-defining subjects, whose powers of detached, analytical empirical observation take absolute precedence over any place for knowledge based on passion or empathy.

However, a more precise paradigm suitable for a situation which may be peculiar to North–South relations is suggested by Robert Cooper's *The Breaking of Nations*.

Concluding remarks: towards a more precise paradigm

Cooper denies the universality of international society and divides it into three parts: the premodern, the modern, and the postmodern. The United Nations is an expression of the modern, while failed states come largely within the ambit of the pre-modern. This means, on a practical level, that the language of the modern UN does not apply to pre-modern states. This is not to say the Charter is violated in that context; it is simply conceptually inapplicable.[103]

The pre-modern refers to the post-imperial chaos of Somalia, Afghanistan, and Liberia. The state no longer fulfills Weber's criterion of having a legitimate monopoly on the use of force. Cooper elaborates upon this with respect to Sierra Leone.[104] This country's collapse teaches three lessons. First, chaos spreads (in this case, to Liberia, as the chaos in Rwanda spread to the Congo). Second, crime takes over when the state collapses. As the law loses force, privatized violence enters the picture. It then spreads to the West, where the profits are to be made. The third lesson is that chaos as such will spread, so that it cannot go unwatched in critical parts of the world. An aspect of this crisis is that the state structures themselves, which are the basis of the UN language of law, are a last imperial imposition of the process of decolonization.

The modernity of the UN is that it rests upon state sovereignty and that in turn rests upon the separation of domestic and foreign

affairs.[105] Cooper's words are that this is still a world in which the ultimate guarantor of security is force. This is as true for realist conceptions of international society as governed by clashes of interest as it is for idealist theories that the anarchy of states can be replaced by the hegemony of a world government or a collective security system: 'The UN Charter emphasizes state sovereignty on the one hand and aims to maintain order by force.'[106]

It is because the world is divided into three parts that three different security policies will be followed.[107] Europe is a zone of security beyond which there are zones of chaos which it cannot ignore. While the imperial urge may be dead, some form of defensive imperialism is inevitable. All that the UN is made to do is to throw its overwhelming power on the side of a state that is the victim of aggression.[108] Cooper generally counsels against foreign forays. European humanitarian intervention abroad is to intervene in another continent with another history and to invite a greater risk of humanitarian catastrophe.[109] However, the lessons of recent state collapse in Sierra Leone and other places cannot be ignored. Empire does not work in the post-imperial age, that is the acquisition of territory and population. Voluntary imperialism, a UN trusteeship, may give the people of a failed state a breathing space and it is the only legitimate form possible, but the coherence and persistence of purpose to achieve this will usually be absent. There is also no clear way of resolving the humanitarian aim of intervening to save lives and the imperial aim of establishing the control necessary to do this.[110] While Cooper concludes by saying that goals should be expressed in relatives rather than absolutes, his argument is really that the pre-modern and the modern give us incommensurate orders of international society.

This brings us back to the conversation between Walmsley and Wingate at the Foreign Office in 1957. After reading Dixon's address to the Security Council, Wingate said he would have expressed himself more frankly. Walmsley replied that one could speak reasonably to reasonable people, but that at the UN it is better not to make unnecessary admissions. I think that is where Britain still remains, except that the world in which Britain operates today has become infinitely more dangerous. Is it not time to rethink the nature of reasonableness?

Notes

1 *ICJ Reports* (1969), 3 at 77.
2 M. Sorensen, *Les sources du droit international* (1946) esp 109.

3 A. D'Amato, *The Concept of Custom in International Law* (1971) 82–4.
4 Ibid., 52; Sorensen, *Les Sources du droit international*, 52.
5 *L'Unité de l'ordre juridique international, Cours général de droit international public* (2003) 160; the author's translation.
6 Ibid., 160–1.
7 Ibid., and the literature cited therein: a comprehensive survey of doctrine, especially 'continental.'
8 For instance, N. K. Hevener on the 1971 *South West Africa* opinion, 'A New International Legal Philosophy,' 24 *ICLQ* (1975) 790, at 793–4; and R. Churchill on the *Fisheries Jurisdiction Cases,* 'The Contribution of the ICJ to the Debate on Coastal Fisheries Rights,' 24 *ICLQ* (1975) 82.
9 *ICJ Reports* (1986)1, para. 184 of judgment.
10 Ibid., para. 186.
11 Ibid., para. 206.
12 Ibid., para. 207.
13 Ibid., para. 208.
14 Ibid., para. 261.
15 Ibid., para. 207.
16 Ibid., para. 263.
17 So the true founders of modern legal positivism are Robespierre and Saint Just.
18 G. de Lacharrière, *La Politique juridique éxterieure* (1983).
19 Ibid.
20 Ibid.
21 R. J. Dupuy, *La Communauté internationale entre le mythe et l'histoire* (1986).
22 Ibid.
23 Ibid.
24 Ibid.
25 T. Carty, 'The Origins of the Doctrine of Deterrence and the Legal Status of Nuclear Weapons,' in H. Davis, (ed.) *Ethics and Defence* (1986) 132.
26 R. Nisbet, *Twilight of Authority,* at 191, quoted in T. Carty, 'Legality and Nuclear Weapons: Doctrines of Nuclear Warfighting,' Davis, Ethics and Defence, 152.
27 J. Garrison, *The Darkness of God: Theology after Hiroshima*, (1982) 29–33 quoted by the author, in Davis, *Ethics and Defence* at 153.
28 Carty, *The Decay of International Law,* 111–13.
29 C. Guttierrez Espada, *El Estado de necessidad y el uso de la fuera en derecho internacional* (1987), a comprehensive review of the treatment of the issue by the ILC at 47–59, and especially at 36, 59–61.
30 ICJ (2002) 1.

31 *Regina v. Bartle and the Commissioner of Police for the Metropolis ex parte Pinochet*, March 24, 1999, www.publications.parliament.uk/pa/ld/ldjudgmt.htm.
32 M. Akehurst, 'The Concept of Custom in International Law,' *BYIL* 47 (1974–5) 195.
33 A. Wendt, *Social Theory of International Politics* (1999) 179.
34 Ibid.
35 Ibid., 181–2.
36 Ibid.
37 A. Rivier, *Principes du droit des gens* (1896) 35, C. Rousseau, *Droit international public*, vol. 1, (1970) 324, and P. Guggenheim, 'Contribution à l'histoire des sources du droit des gens,' 94 *Hague Received* (1958) 53.
38 F. von Holtzendorff and A. Rivier, *Introduction au droit des gens*. The reliance of the textbook on this work is quite explicit, e.g. 27, 31, and 37.
39 Ibid., 140–1.
40 Ibid., 142–3, 145.
41 Obituary of A. Rivier by M. E. Lehr, *Annuaire de l'Institut de Droit International* XVII (1898) 415, 429.
42 J. Habermas, *L'Espace public* (1986). This part of the argument draws upon what the author has already written in his 'Changing Models of the International System,' in W. E. Butler (ed.), *Perestroika and International Law* (1990) 13–30.
43 Cited in E. Nys, 'Alphonse Rivier, sa vie et ses oeuvres,' *Revue de droit international* XXXI (1899) 342, 344.
44 Speech of M. Mancini, in G. Rolin-Jaequemyns, *De la necessité d'organiser une institution scientifique permanente pour favoriser l' étude et les progrés du droit international*, *Revue de droit international* V (1873) 463 at 706.
45 Ibid., 705.
46 Ibid., 463.
47 *Principes du droit des gens* I, 27.
48 Ibid., 29.
49 R. P. Dhokalia, *The Codification of International Law less* (1970).
50 Note 43 at 704.
51 Ibid., Mancini, in Rolin – Jaequemyns, *De la necessité d'organiser une institution scientifique,* 704.
52 R. Albrecht-Carrie, *A Diplomatic History of Europe* (1967) 152–3.
53 A. J. Mayer, *The Persistence of the Old Regime* (1981) 79–127.
54 Note 41, at 34, 38.
55 Ibid., 39.
56 Ibid., 47.
57 Ibid., 53.

58 Ibid., 56–7.
59 Ibid., 91–3.
60 Ibid., 96–8.
61 Ibid., 114–15.
62 Ibid., 118.
63 Ibid., 125–6.
64 Habermas, *L'Espace public*, 165.
65 Ibid., 167.
66 Ibid., 170–2.
67 Ibid., 203.
68 Ibid., 208.
69 Ibid., 209.
70 Ibid., 248.
71 Ibid., 257.
72 Ibid., 259–60.
73 See further, A. Carty, 'Scandinavian Realism and Phenomenological Approaches to State and General Customary Law,' *EJIL* 14 (2003) 817–41.
74 A. Carty and R. Smith, *Sir Gerald Fitzmaurice and the World Crisis, a Legal Adviser in the Foreign Office 1932–1945* (2000) 25 ff.
75 See the use of ethnographic theories of Clifford and Rouland in A. Carty, 'Critical International Law: Recent Trends in the Theory of International Law,' EJIL 2 (1991) 66–96.
76 A. Carty and R. Smith (eds), *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office (1932–1945)* (2000) 23–7.
77 M. Mendelson, 'The Subjective Element in Customary International Law,' *BYIL* 66 (1995) 177.
78 Ibid., at 195–6.
79 Ibid., See further G. Marston, 'The Evidences of British State Practice in the Field of International Law,' in A. Carty and G. Danilenko (eds), *Perestroika and International Law, Current Anglo-Soviet Approaches to International Law* (1990) 35, says that parliamentary sources predominate in the *UK Materials on International Law*, i.e. positions taken by Ministers before Parliament. He points out that only rarely is material made available here which has not already been released to the public.
80 A. Aust, 'The Theory and Practice of Informal International Instruments,' 35 *ICLQ* (1986) 787.
81 See A. Carty, 'The UK, the Compulsory Jurisdiction of the ICJ and the Peaceful Settlement of Disputes,' in Carty and G. Danilenko (eds) *Perestroika and International Law*, 131–3. Aust's 1986 *International and Comparative Law Quarterly* article is discussed here.
82 M. Curtis, *The Ambiguities of Power: British Foreign Policy since 1945* (1995); Curtis, *The Great Deception: Anglo-American Power and World Order* (1998).

83 G. Marston (ed.), 'United Kingdom Materials on International Law,' *BYIL* (1986) 57. 614–20.
84 Curtis, *The Ambiguities of Power: British Foreign Policy since 1945,* 98–9.
85 Dobson, 'The Great Deception (Book Review),' 74 *International Affairs* (1998) 923–4.
86 UK, Foreign Office, FO/371/126877/EA1015/89.
87 UK, Foreign Office, FO/371/126887/EA1015/365.
88 UK, Foreign Office, FO/371/126884/EA1015/282(A), August 20, 1957.
89 UK, Foreign Office, FO/371/126884/EA1015/283, August 20, 1957.
90 UK, Foreign Office, FO/371/126878/EA1015.
91 See also Nolte, *Eingreifen auf Einladung* (1999) 86–9.
92 E. Lauterpacht, 'Contemporary Practice of the United Kingdom,' *ICLQ* 7 (1958) 99–109.
93 UK, Foreign Office, FO/371/126887/EA1015/371.
94 UK, Foreign Office, FO/371/126829: FO Confidential Note on the Agreement of Sib, and Sir Pierson Dixon's Speech in the Security Council of 20/8/1957, prepared by Sir Ronald Wingate.
95 UK, Foreign Office, FO Confidential Print on the Buraimi at 157.
96 UK, Foreign Office, FO/371/26882/EA1015/235.
97 UK, Foreign Office, FO/371/26882/EA1015/235(A).
98 Ibid.
99 Dorril, *MI6: Fifty Years of Special Operations* (2000) 729–35.
100 Townsend, *Oman: The Making of a Modern state* (1977).
101 M. Curtis, *Web of Deceit: Britain's Real Role in the World* (2003) 279.
102 J. Bartelson, *A Genealogy of Sovereignty* (1995), especially chapter 5.
103 R. Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (2003) especially 16–37.
104 Ibid., 66–9.
105 Ibid., 22–6.
106 Ibid., 23.
107 Unfortunately, time does not permit further discussion of postmodern Europe.
108 Ibid., 58.
109 Ibid., 61.
110 Ibid., 65–75.

3

INTERNATIONAL LEGAL PERSONALITY

1

In the *Case Concerning a Frontier Dispute* (Burkina Faso and the Republic of Mali) the International Court of Justice noted that, given the acceptance of the principle of *uti possidetis juris* (reliance upon former colonial administrative boundaries) in the case *by both* parties it was not necessary to show that the principle was firmly established in international law where decolonization was involved. Nevertheless, the Court insisted that *uti possidetis juris* is a general principle of international law which exists to prevent the stability of new states being endangered by fratricidal struggles, themselves provoked by the challenging of frontiers following the withdrawal of the administering, colonial power. This is not just an administrative procedure in Africa but a rule of general scope.[1] One might note the oblique way the issue of self-determination of peoples is side-stepped by such turns of phrases as that African states have been induced 'judiciously to consent to the respecting of colonial frontiers and to take account of it in the interpretation of the principle of self-determination of peoples . . .'[2] This is a euphemism for the suppression of secessionist movements in African states.

This African decision has been applied by Europe's international lawyers in the context of the break-up of Yugoslavia. The Conference on Yugoslavia's Arbitration Commission, in its Opinion No. 3 (January 11, 1992), had to answer the question whether the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia should be regarded as frontiers in terms of public international law – a question put by the Republic of Serbia. The Opinion of the Commission was that once the break-up of Yugoslavia led to the creation of one or more independent states, except where otherwise agreed, the former boundaries between the Yugoslav republics should become frontiers protected by international law. The principle of respect for the territorial status quo and

the principle of *uti possidetis juris* meant that these boundaries were not to be altered, except by agreements freely concluded. The alteration of existing frontiers or boundaries was not capable of producing any legal effect.[3] Another intimately related question was put by the Republic of Serbia.

Does the Serbian population of Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination? The answer of the Commission, in its Opinion No. 2, was negative. It held: (1) Not all the implications of self-determination were clear under contemporary international law. Nevertheless, the right of self-determination must not involve changes to frontiers at the time of independence, except by agreement between the states concerned – the principle of *uti possidetis juris*. (2) Ethnic religious and language communities within a state had the right to recognition of their identity under international law. One possible consequence of this principle might be for the members of the Serbian population in the two republics to be recognized under agreements between all the republics as having the nationality of their choice.[4]

So it appears that the system of international law offers the general admonition that no claim to self-determination must be allowed to infringe the principle of territorial integrity of existing states. However, international law also accepts the imperative that there are limits to an insistence upon the status quo. Beyond a certain measure of endurance, people may revolt against discrimination and human rights and ethnic abuse.[5] International law attempts, as well, to insist on a right of democratic governance as a ground of legitimacy which states are supposed to accept.[6] While all of these considerations amount to interesting grounds for intellectual reflection and debate, there is no consistent and reliable institutional theoretical or practical framework for accommodating these different elements of a possible legal system.

The subject is made that much more difficult because of the unwillingness of the profession to consider theoretical questions – in this case, what minimum set of principles and institutions must an international legal order have to qualify legitimately for the title of legal order or system? For instance, it is particularly difficult within the discipline of analytical jurisprudence, which takes its inspiration from Hart's *Concept of Law,* to pose effectively the question whether international law makes up a legal system. It supposes the priority of whatever happens to be the dominant (i.e. general or community) perspective of the chief officials of a legal order as against recalcitrant

minorities or dissident members. This community priority is inevitable given the value skepticism which underlies the analytical approach. One can only understand obligation from the internal perspective of those submitting themselves to it. One can only take language at face value, asking how it is actually used in society.[7]

So, by way of typical illustration, the present editors of Oppenheim's ninth edition of *International Law* define international law, as any other law, in social terms as rules of conduct accepted in a community by common consent and enforced by an external power (para. 3). They rely upon the classical distinction between law and morality (para. 17) in terms of the latter applying to conscience and the former being enforced by external authority. A clear weakness of international law, recognized by the editors, is that the enforcement mechanisms of international law continue to be unsatisfactory and the Security Council does not offer an adequate substitute. Yet the same editors treat the controversy about the legal nature of international law as unrealistic (para. 4) simply because states recognize that their freedom is constrained by law. This remark is accompanied by the observation, assigned to a footnote, that such a position is not inconsistent with the fact that states may differ as to precisely what rules that law prescribes. It may be that the editors are not concerned so much about the frequent resort to unilateral action by states in the form of self-help or special interpretations of the right of self-defense, etc. because it must always be possible to have judicial or Security Council review of such decisions if the idea of law is not to be eliminated from the scene (para. 127). That is, relevant officials could, conceivably, appear who would apply their internalized norms. The legal observer can, given his lack of status, add nothing. The consequences, for the so-called right of self-determination are devastating. The International Court of Justice has not clearly pronounced on the meaning of the right.

Indeed, this brings us to the larger question whether international law as a system has any answer at all concerning international legal personality, especially as it affects states. The answer is that it does have a pragmatic answer that accepts states as the primary subjects of the system, in accordance with a more or less explicit principle of effectiveness, a principle that fits perfectly into the analytical approach above outlined to the theory of law. Cassese provides an outstandingly exhaustive and authoritative exposition of this view, much more historically grounded and reflective than is usual in the profession. He has said that there is no international legislation

setting out detailed rules, but that '*it is possible to infer* from the body of customary rules granting basic rights and duties to States that these rules presuppose certain general characteristics in the entities to which they address themselves' (author's italics).[8] These general characteristics confirm a principle of effectiveness. Cassese explains that the principle of effectiveness permeates the whole body of rules making up international law. So, 'New situations are not recognised as legally valid unless they could be seen to rest on a firm and durable display of authority. No new situation could claim international legitimacy so long as the "new men" failed to demonstrate that they had firmly supplanted the former authority. Force was the principal source of legitimation . . .'[9] Cassese says this applied essentially to the traditional setting of the international community.[10] However, it continues to provide the central structural framework, followed in practice, also by Cassese, with a ragbag of inconclusive exceptions.

It is still the case that the concept of statehood rests on the principle of effectiveness. The rules granting basic rights and duties to states suppose two elements:

> The first is a central structure capable of exercising effective control over a given territory. The bodies endowed with supreme authority must in principle be quite distinct from and independent of any other State that is to say endowed with an original (not derivative) legal order . . . The second element needed is a territory which does not belong to or no longer belongs to, any other sovereign State, with a community whose members do not owe allegiance to other outside bodies . . . [T]erritory may be large or small, but it is indispensable if an organized structure is to qualify as a State and an international subject. International law always requires *effective* possession of, and control over, a territory . . .[11]

It might be argued that the concept *international law* and the *principle of effectiveness* are splintered, absent *voices of authority* onto which an author such as Cassese projects what I would consider are the forgotten sediments/experiences of diplomatic and national constitutional history. Cassese explains (para. 16) that the word *state* marks a unitarily closed-up entity in which all authority is granted only by the state itself. Underlying it is a shift in loyalty from the family, local community, or religious organization to the state. It is such loyalty patterns, essentially a social process, which mark the legal supremacy of the state. However there is a special quality to this entity. Following Strayer, Cassese notes that it persists in time and is fixed in space, permanent and impersonal, although underlying it is

simply agreement on the need for an authority which can give final judgments. Once again what Cassese stresses is *closure*. The concept of state excludes any authority above or below it. This excludes any possibility that there could be any interpenetration of such states, that one could set in motion a process of cultural translation from one entity to the other. As Cassese puts it, each country (his choice of word) 'increasingly regarded each other as separate and autonomous entities, and each struggled to overpower the other' (para. 16).

This would seem to grasp best the reality of the concentration of authority in the state in the seventeenth century, at least as Cassese describes it. Beyond the Church and the Empire, remembering that the Protestant Churches are purely national, all signification is concentrated in the state. This allows Cassese to say (para. 11) that the lack of strong political, ideological, and economic links between states (as Christian principles were not allowed to override national interest) resulted in self-interest holding sway. What is missing from the theory of international law is a detailed account of the significance of Hobbeseanism for the absence of international legal structures. In fact, the absolutist state has had to mean the disappearance of a universal international legal order. In the period of transition from the medieval-feudal system of public authority over land and population to the modern absolutist state in the course of the sixteenth and early seventeenth centuries, the focus of public lawyers was on the terms of submission of subjects to rulers. The tradition that the central legal concept should be jurisdiction (of a lord over his vassals in his court) gave way to the more nebulous notion of the limits of the supreme power (*potestas suprema*), in effect, of an unconstrained executive. A fatal development was that, among public lawyers and political theorists of the state, all interest in the justification of the historical legal title to territory of individual states was abandoned. Instead, attention was devoted simply to the capacity of the Prince to exercise power over subjects. For this power to have sought or found justification would have meant looking to a law of the Holy Roman Empire or of the Papacy, as this was the traditional sense given to the existence of a higher authority. The authority of the Prince was given a rationale by political theorists such as Bodin.[12]

The very idea of absolute authority had to mean its separation from any argument of legitimacy of the relationship of ruler to ruled. The legal development marked a separation of the governing power from concrete legal relations, where primary importance was given to the concept of frontier as the means of delimiting the territorial scope

of the Prince's power.[13] Territory came to be defined merely as the areas of command of the Prince, with a supposedly unquestioning duty of the subject to owe submission to the Prince. The difficulty, from the late seventeenth century to the twentieth century, and particularly in the eighteenth century, was that the territorial Princes of Europe did not obtain thereby a convincing legal foundation for their possessions, for instance land and population. The focus was simply on the advantages of order which would follow from a generalized submission. As a result, there were ever harsher territorial conflicts, as the notion of the need for princely authority in political theory was not matched by an international-European consensus on the basis for territorial title. There had been a sacrifice of political legitimacy, for instance, based on the consent of the population, in favor of the value of public safety. This was understandable, in the context of bloody civil wars, for instance, after the wars of religion. However, safety was conceived of in purely internal, not international, terms.[14]

Cassese fully outlines further relevant material for the significance of the principle of effectivity. Where frontiers were extended outside Europe there was just as little conviction brought to bear on the legitimacy or illegitimacy of territorial expansion. There is, first (para. 19), the remarkable withdrawal of European states in the nineteenth century to a position of ethnocentric dominance, in which they treated the non-European world as, in principle, not within the international society of states in the sense (borrowing Hedley Bull's terminology) that 'a group of States, conscious of certain common interests and values, forms a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another . . .' This notion of community was based upon a sense of cultural superiority which is also reflected still in the notion of general principles of law recognized by civilized countries (see Cassese, para. 94). It is Cassese who explains that this led to two distinct classes of relations with the outside world depending upon whether they consisted of states 'proper' such as the Ottoman Empire, China, or '[were] instead made up of communities lacking any organized central authority (tribal communities or communities dominated by local rulers, in Africa or Asia).'

Detailed case studies of these two categories will reveal that the dichotomy is not accurate, that in both cases the so-called principle of effectiveness operated. The definition of a state, in terms of defined territory and a population subject to effective governmental control, provided the conceptual framework for the subordination of non-Western

countries to the West, above all in the period 1815–1960. The so-called principle of effectiveness is, by its nature, impervious to intercultural *translation*, dialogue, etc. The reason is that it served an *incorporative* function. The concept of culture, in the sense which Hedley Bull has spoken of a society of states, becomes, in the hands of nineteenth-century European states, a notion of civilization which served to accommodate European perspectives on how international society should function. This is the context in which M. F. Lindley, in *The Acquisition and Government of Backward Territory in International Law* (1926), said that the requirement of a civilized state was political organization. The latter meant 'a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards'.[15]

In other words, the conditions of statehood in general international law, of which Cassese speaks, were also elaborated in a colonial context. Any entity not capable of providing security for persons and property, in terms identical to what Westerners could expect in their own countries, indeed any entity which was not able to resist penetration by Western states anxious to provide this security for themselves, could expect to be incorporated into the territory of a Western state. The two categories represented by Cassese–subjection to unequal capitulation treaties, and incorporation of supposedly *res nullius* territories–merely reflect in simplistic terms a wide variety in the measure of penetration and control of non-Western societies necessary to ensure a Western-style world order.

The discourse of civilization is one of *modernization*. Since the time of Vitoria there was a European expectation that certain inalienable rights were associated with the freedoms of trade, travel, and proselytizing.[16] The process of modernization was increasingly coercive in the course of the nineteenth century. This is the true meaning of the so-called principle of effectiveness. As Gong puts it: 'While positive international law sanctioned the selective use of force against the "uncivilized", and defined such countries as "uncivilized" – partially for the circular reason that they were unable to defend themselves against military attack – the effect of such doctrines did not depart that radically from what Vitoria's natural law philosophies had countenanced in the past'.[17] The 'need' continued for the same universal freedoms of Vitoria. Positivism itself (the philosophical foundation of 'effectiveness'), as a belief in the science of progress, physical achievement, on analogy with the natural sciences,[18] will favor effectiveness.

A close examination of the jurisprudence usually presented as material for a law of territory shows that it concerns mainly relations with non-Western peoples. The prime example is the *Island of Palmas Case*.[19] The language of the arbitrator shows how far he was concerned with ensuring a globally *efficient* organization of territory. With respect to title by occupation, arbitrator Huber says: 'The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right . . .' He points out how effectiveness, insisted on with respect to occupation, is, in fact, already there 'with territories in which there is already an established order of things.' Indeed the concept is supposed to precede international law. For Huber alleges that 'before the rise of international law, boundaries of land were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between states.'

The reason for this perspective is quickly provided. Territorial sovereignty has a corollary: the duty to protect within the territory the rights of other states, together with the rights which each state may claim for its nationals in foreign territory. 'Territorial sovereignty serves to divide between nations the space upon which human activities are employed, in order to ensure them the minimum of protection of which international law is the guardian . . .' The analogy is drawn with abstract rights to property in municipal law, which do not need to be exercised. In the absence of a super-state the same license cannot be tolerated in international law. One might ask what evidence Huber offers for the following proposition, which seems to suppose an independent subject, *international law*, just as does Cassese with his principle of effectiveness:

> International law, in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals . . .

As for the original inhabitants of the island they are referred to in the context of the type or amount of exercise of sovereignty required.

Indeed, Huber says that some exercise of sovereignty 'over a small and distant island, inhabited only by natives, cannot be expected to be frequent' so that one need not go back very far. Nonetheless, 'a clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible . . .' In my view there is not a hard distinction between lands inhabited by 'natives' and lands inhabited by non-Western states in the development of 'international law' in the nineteenth century. This is because states such as the Netherlands did conclude contracts with 'native chiefs' which were taken as evidence of consolidation of sovereignty in a context in which the 'natives' were not entirely without rights. Their land was not *res nullius*. At the same time Huber describes how state sovereignty evolved in the context of more complex organizations in the nineteenth century. 'It is quite natural that the establishment of sovereignty maybe the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial Power over a native State, and in regard to outlying possessions of such a vassal State . . .'

These limitations imposed by the so-called principle of effectiveness, rooted in the *de facto* legitimated concentration of power in the state, still dominate analytical legal positivism in its consideration of such issues as the circumstances in which the right of self-determination might now be exercised. Concerning self-determination the general consensus among international lawyers is, as has been seen above, that there is no right of secession with respect to a part of a state which has once taken part in a decolonization process. The way they reach this conclusion shows the influence of the analytical approach. Crawford points to how state practice demonstrates the extreme reluctance of states to recognize or accept unilateral secession outside the colonial context.[20]

He points out how no new state formed since 1945 outside the colonial context has been admitted to the UN over the opposition of the predecessor state. This remarkable proposition is demonstrated by the extreme example of Bangladesh, which was not admitted to the UN until 1974 after its recognition by Pakistan.[21]

The formulation of the question by Crawford needs to be considered again. It accepts as conclusive, as a legal value, the standpoint of existing states, that international law does not require them to accept their own dismemberment without their consent. Hence Crawford defines secession as 'the process by which a particular group seeks

to separate itself from the State to which it belongs.' The value judgement-laden character of this proposition is quite clear. Crawford could simply have spoken of existing states and changing the status quo. This he distinguishes 'from a consensual process by which a State confers independence upon a particular territory and people by legislative or other means . . .' – language which is equally value-laden.[22] Since international law is supposed to rest on the consent of states, Crawford is saying that states cannot be taken to have consented to their dismemberment without their consent because they have not consented to their dismemberment without their consent. This is obviously bound to be true because the proposition is tautological. The question remains how the professional mind reaches such an intellectual impasse.

To paraphrase an argument that has already been used in another context,[23] in the nineteenth century the German international lawyer August von Bulmerincq, in his *Praxis, Theorie und Codification des Völkerrechts* (1874), was anxious to demonstrate that the precedents of Italy, Belgium, and Greece are not enough to demonstrate the existence of a rule of international law that there is a right of peoples to self-determination. They do not provide precise evidence of who in general is a subject of the right and how it is to be exercised. Indeed, this would necessitate a congress of states which would have to assemble and decide that a particular entity enjoyed the right; these states would then have to award the right against a particular state, which of course already existed. The question would then arise whether a war to enforce this right would be justified. Law consists of a system of rights guaranteed by force. Von Bulmerincq concludes that any right to self-determination in those terms would run counter to a legal order which already guaranteed the integrity of states.

However, this reasoning conceals a hidden major premise, that there is an international legal order. If there is no such order it will still be true that international law has not evolved rules to define the scope and exercise of a right to self-determination. Yet clearly this would not mean that there remains an existing legal order to be upheld. The most that a possible legal order could mean is that states in the possession of territory claim that the principle of effectivity with respect to their territory has legal character. This is all that analytical jurisprudence can say. Those groups that wish to dismember existing states will dispute the claim. The outcome will depend upon which party is the stronger. In fact, this logical discontinuity of argument reveals the huge vacuum in the theory of legitimacy – a corpus

of argument by lawyers about justification of territorial title–to which reference has already been made.[24]

What there is in the way of a classical or traditional international law of territory rests entirely on treaty law, particularly peace treaties and general treaties defining the European and international system. What orthodox legal analysis leaves out of account is the significance and place of treaties in the history of international relations. It is true that it is virtually impossible to find a substantial territorial change, which has the object to assure a new human grouping state autonomy, without an agreement to confirm it. However, agreement in international society has been and continues to be – notwithstanding the Kellogg–Briand Pact and the UN Charter, and their supposed effect in producing the articles on coercion in the Vienna Convention on the Law of Treaties – marked by intense levels of pressure which usually take the form of physical violence. An example close to home is marked by Anglo-Irish relations. By 1918 the UK was offering Ireland devolved government as a political settlement. Sinn Féin won a majority in elections 1918 and acted on the basis that Ireland was independent. Violent conflict ensued. In the summer of 1921 the UK offered a truce and a peace treaty granting 26 counties Dominion status. The Irish negotiators demanded complete independence for the whole island. They were met with a threat in the form of an ultimatum to renew the conflict and accepted the Dominion status which they had been offered. After 1970 political violence was renewed in Northern Ireland and with the Good Friday Agreement the UK government accepted substantial modifications to the 1921 Treaty in favor of the nationalist minority. IRA prisoners were released and their political representatives have been in government. At the same time large parts of the majority community consider this agreement was induced through terrorism and remains radically unsound because a compromise with terrorism is at the heart of the agreement. As for the consent to the agreement in a referendum, dissident majority opinion can simply interpret that as a vote for peace – which everyone wants on his own terms.

If international practice as to the significance of consent is looked at in this context Crawford's examples, which do not amount to precedents, come to look more and more like von Bulmerincq's and quite remote from how international practice usually produces consent. In other words, there is no close examination of the process whereby consent is produced. The most bizarre example is the break-up of Yugoslavia. This is characterized by international lawyers – Crawford accurately represents the orthodox view – as a dissolution

of a state which no longer exists. The self-styled EC Arbitration Commission concluded after a review of developments including the adoption of the Serbia-Montenegro Constitution in April 1992 that the process of dissolution of Yugoslavia is now complete and that Yugoslavia no longer exists. Crawford himself claims that it should be stressed that the questions of international status in relation to Yugoslavia since 1991 have focused on the constituent republics from an early stage not as entities seceding from a functioning state, but as the product of the dissolution of a state the majority of whose territories and people, faced with violent attempts to hold the state together by one of its ethnic groups, wished to separate. This sentence has an abstract and abstruse subject, which recognizes the centrality of ethnic struggle within ex-Yugoslavia but does not focus itself on the nature of consent being given or from whom the consent is coming.[25]

Another remarkable example, which receives detailed treatment, is Eritrea. It has a special interest in view of the analysis, which will be offered later. It represents a settlement of colonial territory by colonial powers, which subsequently was disputed. The Italian and then British colony was federated with Ethiopia under UN auspices and the latter did not react when the federation was abolished in 1962. There followed thirty years of political violence until a new Ethiopian government, which received Eritrean military support in coming to power, recognized the right of the Eritreans to self-determination. While the agreement between the latter referred to the principle, no UN resolution did so.[26] It might be argued that what counted was the agreement between the parties rather than the entirely passive and irrelevant UN. It is also clear that the agreement was the outcome of a history of enormous violence.

The heart of Crawford's argument should concern the exhaustive list of instances which he gives in which the struggles for secession, whether violent or not, have not been successful. He lists twenty-nine which have actuality. They cover areas where there are most serious human rights and humanitarian concerns, such as South Sudan, Sri Lanka, Kurdistan, and Chechnya. He argues correctly that all these cases have one feature in common. Where the government of the state is opposed to secession, such attempts have gained virtually no international support or recognition, even where other humanitarian aspects of the situations have triggered widespread concern.[27] Clearly, here there has been no agreement for separation and there can be no question of attempting to give any interpretation positive or negative to such an event.

However, they also have another common feature. They involve ethnic conflict within and across existing state boundaries. This feature unites these conflicts with others which do affect and concern state identity even if the issue cannot be characterized as one of secession. The Palestinian–Israeli conflict may be the most striking. However, in Africa the Congolese civil war involving most neighboring African states has ethnic implications. The Great Lakes Region encompasses the stalemate between Rwanda and Uganda in Eastern Congo. So also the conflicts in Senegal and Sierra Leone threaten to dissolve West African boundaries. As the *New York Times* (January 29, 2001) put it, with particular respect to the Congo conflict: 'No Western government likes to admit that Africa's awkward colonial borders are finally dissolving . . .' In this context it is probably too optimistic to expect that classical-style peace treaties will be concluded. There may not be firm parties to conclude them. Yet it is even more irrelevant to ask what the international community wishes – the reference to the so-called international legal order or the UN – because these, however characterized, are simply not active players. This is the correct interpretation to give to failure of the UN (or whatever) to recognize the legitimacy of this or that territorial change, forceful occupation, or attempted secession.

Instead, what appears to be at stake is the weakening of the state in relation to the ethnic allegiances of its populations. In Western Europe alone Crawford gives ten examples of ethnic unrest involving every existing state, except the Netherlands and Portugal. If one notes as well that, since 1989, about fifteen new ethnic states have replaced two previous multi-ethnic states one might wonder whether the issue of consent of the parties and international recognition might not be as important elements to discuss as the nature of political organization of community as such. Here apparently the conflict between the classical state based on the principle of effectivity, and the more recent, if not proven to be permanently viable entity, the ethnic nation-state.

2

So international law is confronted with incommensurate epistemologies concerning its collective communities, whether characterized as sovereign states or nation-states – the absolutist language of security and the ethnic language of sympathy. It has to be appreciated that, despite the domination, in international legal opinion, jurisprudence, and doctrine of state sovereignty against the principle

of self-determination, the two approaches are in international practice left as irreconcilable and unresolved. State, territorial integrity, etc. is supposed to dominate over against self-determination. The principle of effectiveness, linked to order and security, dominates, above all, the system and technique of international law. However, the doctrines of the failed state, the experience of contemporary Africa, and numerous other acutely unresolved conflicts (e.g. Chechnya, Kashmir, Palestine, Tibet, etc.) show that while international law provides a ***legal*** answer, it does so by relying upon historical legal traditions that have become anachronistic and incomplete. The international law tradition actually opposes two fairly equally defective explanations or solutions to international society, the language of absolute order and the anarchy of particularist emotions of belonging to kin and land.

The language of order is rooted in the Renaissance state, and as such is unable to ground territorial legitimacy and, as a consequence, international order. While Cassese correctly alludes to the significance of the Renaissance state for international law, Bartelson describes the rupture with the past more systematically. The late medieval tradition, which included Vitoria and especially Grotius, started from the premise that man is still embedded in a universal society and in the Cosmos. As Bartelson puts it: 'the question was not how to solve a conflict between conflicting sovereigns over the foundation of a legal order, but how to relate concentric circles of *resembling* laws, ranging from the divine law down to a natural and positive law . . .'[28] Whether Vitoria or Grotius, they would look to the resemblance of episodes and events by drawing upon an almost infinite corpus of political learning recovered from antiquity, whether legendary or documented, 'because it is assumed that they (modern rulers) share the same reality, and occupy the same space of possible political experience . . .'[29] Neither Grotius nor Vitoria would countenance any opposition between the kind of law that applies between states and within states, since this would imply an absence of law.[30]

The break with the medieval–Renaissance picture comes with the modern state, arising out of the wars of religion of the sixteenth and seventeenth centuries. This broke with any attempt to ground its existence in a transcendent order. The new state had to ground itself in the absolute, unquestionable value of its own security, as defined and understood by itself. The science of this state was the Hobbesean sovereign who obliges, but is not obliged, to whom everyone is bound, but who is itself not bound. Territorial integrity is an aspect

of the security, which rests in the already established territorial control. This control of territory comes to be what the so-called law of territory has to authenticate and validate. The extent of the territory of one sovereign is marked by the boundary of the territory of other sovereigns. The actual population of each sovereign territory is limited to the extent of power of the sovereign, measured geopolitically. The populations of other sovereigns are not unknown 'others' in the modern anthropological sense, but simply people beyond the geopolitical boundary of the state.

The purpose of law is no longer to re-establish resemblances in a fragmenting medieval Christian world, but to furnish dependable information about the limits, as boundaries, of the sovereign state, whose security rests precisely upon the success with which it has guaranteed territorial order within its boundaries, regardless of whatever is happening beyond these boundaries. Mutual recognition by sovereigns does not imply acceptance of a common international order, but merely an analytical recognition of factual, territorial separation, which, as long as it lasts, serves to guarantee some measure of security. However, as Bartelson puts it, the primary definition of state interest is not a search for resemblances, affinities of religion, or dynastic family. Instead, interest is a concept resting upon detachment and separation. The rhetoric of mutual empathy or sympathy between peoples is, in a logical or categorical sense, inconceivable. International society is composed of a collection of primary, unknowable, self-defining subjects, whose powers of detached, analytical, empirical observation take absolute precedence over any place for knowledge based on passion or empathy, whether oriented towards sameness or difference.[31]

This structure of sovereign relations remains the basic problematic, which international lawyers face today. The origin of the state is a question of fact rather than law. One may not inquire into its composition or nature. Law is whatever the sovereigns choose to define as such through their will. The instability of this supposed legal order is patent. The status of mutual recognition as a means of assuring security is unstable. There is no agreement about the legal significance of recognition. Fundamentally, the problem is that while there is plenty of what all the state parties are willing to identify as law, there is auto-interpretation of the extent of legal obligation. Kant, as a critic of international law, has been disturbed by the character of this idea of legal order coming from early modernity. He writes of the tradition:

> For while Hugo Grotius, Pufendorf, Vattel and others whose philosophically and diplomatically formulated codes do not and cannot have the slightest legal force (since nations do not and cannot stand under any common external constraints) are always piously cited in justification of a war of aggression (and who therefore provide only cold comfort), no example can be given of a nation having forgotten its intention (of going to war) based upon the arguments provided by such important men . . .[32]

The dominant, alternative way of understanding the state is as an institutional framework, which cultural or national, historically grounded communities give themselves for the conduct of their affairs.[33] As we have seen in chapter 1, Bartelson stresses a sea-change, again of an epistemological nature, which this new institutional understanding of the state merely reflects. In the classical period, law was defined unilaterally by the sovereign (of Descartes and Hobbes). The meaning of legal obligation had no communal sense. It merely attached spatially to a geopolitically limited population. Now it is recognized that the invention of meaning – of which legal meaning, the acceptance of obligation, is merely a part – is directly related to language and the history of the nation. It is no longer the case that sovereigns, detached and separate from society, can determine meanings by legal fiat, by using words to reflect their exclusive monopoly of physical power and the capacity to coerce.

Instead, communities of people related to one another by history and linguistic origin become the sovereign creators of their representations and concepts. Bartelson shows how words are not given to people, to represent factually something external to the subject. It is the activity of the community itself, which creates its own world of experience and gives words to it. Language reflects the experience of an individual but also of the tradition of a collective political being. Therefore language becomes subject to interpretation. Language in its dense reality is able to tell us the history of the institutions signified by the words. This serves to delegitimize state structures, which rest only on geopolitical boundaries. Language worlds cross them with impunity. The world of institutions, as Bartelson has succinctly explained, is made by men and therefore can be reached as a mode of self-knowledge.[34]

This escape of meaning from the incorporating power of the state is what creates the entire agenda for which the international lawyer needs an interdisciplinary method. The reason is that s/he is faced with two opposing paradigms of the state/nation in international law that lead to conflicting answers to the major questions of statehood,

recognition, territory, and self-determination of peoples. This can be seen from a comparison of certain contemporary French and German approaches to statehood in standard textbooks of international law.

Combacau and Sur offer a very strong contrast to German visions.[35] The question arises: Why this work? The answer has to do with the appropriateness of the book for the general spirit of French foreign policy and the dominant place of the French state in thinking about both law and foreign affairs. Maintaining the grandeur of the French state as a world power is a cornerstone of French thinking. This position has two aspects, which make it very complex. The primary aim is to assert the independence of the French State (with a capital S) but in France's reduced postwar situation this is best achieved by harnessing a strong European Union to French ends, a fundamental aspect of which includes opposition to American, and, if need be, American-British hegemony. Binding associations are necessary and law, especially treaty law, has a part to play in creating them, but their aim is to augment national strength and profile. By their nature they can claim no universal or absolute normative value. They are competitive and retain their individualistic character, even at a collective level. So it is recognized that beyond a European Union, which is driven forward under French impetus, international society is dominated by conflicts of interest which can easily become threatening to national security and which are not effectively mediated by international organizations such as the UN or ICJ.[36] The textbook by Combacau and Sur provides a consistent and penetrating analysis of law, the state, and international affairs, which appears rather close to this vision of France in international society.

In their view the problem of the self-determination of peoples does not receive prominent or direct treatment. The primary concern is to emphasize the importance, and indeed the priority, of the state to the international legal order. In the view of these authors (pp. 28–9), if a state commits itself to a rule it is because it needs a regulated conduct, on the part of others, which it can have only by allowing itself to be regulated. The risk of deregulation is a powerful restraint on its emancipating itself from the rules which it consents to have imposed. Reciprocity means that one qualifies one's own act as a response to another act. This thereby follows a logic of subjectivity which underlies the whole system. Because of the lack of hierarchy of norms (p. 28) states recognize that no act can be declared invalid objectively, as each state can literally camp on its own position. It can pretend to

its own representation of acts and situations, and this representation remains subjective as far as any third person is concerned.

The definitions of the objective and the subjective which Combacau and Sur use are taken from their understanding of French public law. That is (p. 19), the objectivity of internal or domestic law rests on the distance of the power of the state from the individuals who are equal before it. A law has been made objectively because it has been made without the consent of the individuals who are equal before it (pp. 20–2). Hence international law (p. 23), by its very nature, ignores the phenomenon of power. The individual interests of states do not (p. 24) represent a public interest. Objective law, that is, constitutional law, does not exist at the international level. There is no equivalent to the state as a guarantor of law, which can designate (determine) the significance of juridical acts or facts (situations).

International law must, if it to be a legal order, create an order of persons with competences which can then modify existing things. Yet, it is still the case (p. 28) that there is no centralization of (legal) disposition at the international level. Law functions as the notaire who 'constate et officialise . . . tout en permettant qu'il en soit tiré certaines consequences . . .' Indeed, even collective guarantees by states remain an aggregate of subjective individual representations. Combacau and Sur stress (pp. 49–50) that the struggle for law as a collection of positive rules has to be seen as a compromise of interests, animated by a power struggle of perceptions and ideologies. The language of universal values (p. 74), etc. has little influence on the politics of states, closed to their own interests, for whom international law is not so much a system of norms as 'une partie de chasse.'

This entire analysis makes little sense unless one explores further the concept of the state, and hence of law, which underlies it. While both are firmly rooted in a European tradition which is not exclusively French, viz., Hobbeseanism, nonetheless Hobbeseanism is receiving at present its most explicit, and maybe lucid, exposition among these French authors. In virtually 100 pages Combacau sets out the implications of his understanding of the state for international law. His starting point is that the history of the state is not a legally justiciable matter. There is an almost mysterious character about the origins of the state. The fact of the state is taken to have come before the theory of the state, in the history of the sixteenth and seventeenth centuries (pp. 265–8). He says of those who have originally founded the state 'ce sont eux qui . . . ont fait dériver de leur propre idée de l'État des règles légales concernant son mode de formation; leur

propre naissance n'est donc pas justiciable . . .' (p. 265). According to international law, the elements which define a state are government, territory, or population. However, it is necessary not to confound the conditions for the emergence of the state with the institutions which are proper for the functioning of a state once effectively constituted. This means, effectively, that the elements are necessary to determine whether a state has come into existence, but international law need not concern itself with them afterwards. To confuse the two dimensions of the state just mentioned, 'C'est prendre son avoir pour son être . . .'

It is the actual corporate character of the state which counts. A state as a structure is inconceivable (p. 268) if it does not have a constitution which treats a group of persons as organs of the state. As Combacau says, the apparition of the state is inconceivable if the collectivity does not give itself the organs by means of which the actions of fact of the social body which it, presumably the collectivity (les agissements du fait du corps social), constitutes already, can be imputed to the legal corporative body (corps de droit) which it claims to become (p. 268). What is missing from this analysis is a clear statement of why and in what senses it does not matter to international law how the 'corps social' becomes a 'corps de droit.'

However, the reasoning can be pieced together from other parts of the work by both authors. Sur says of the relation of state and nation, the coincidence of the two is a delicate matter. The national composition of a state is a social reality and not a juridical matter. International law attaches to the idea of sovereignty and sees in the state a stable element and foundation. The law prefers the stability of frontiers to their being put in question and it prefers to guarantee the rights of minorities to allowing secession (p. 73). Sovereignty itself signifies a power to command. As Combacau says (p. 226), sovereignty signifies the power to break the resistance as much of one's own subjects as of one's rivals in power. It has to subordinate both. The beginning of the institutions of the state are a matter of fact because, by definition, the state does not pre-exist them – that is, the institutions have not come into being by a constitutional procedure. They may claim a legitimacy from a struggle which the collectivity has led against a state which it judges oppressive, but international law is indifferent to the internal organization of collectivities. Nothing requires that organs be representative, but merely that they have power 'de quelques moyens qu'ils aient usé pour le prendre et qu'ils usent pour l'exercer . . .' (p. 269).[37]

Once so constituted the state appears to exist in an immaterial world. It is said that the state as a corporate body is detached from the elements which compose it. It is this reasoning which allows Combacau to say that the moral personality of the state, in the sense of corporate identity, removes the significance of the identity of the persons and the groups which make it up materially. This has the consequence that the greater or lesser modification of the spatial basis or the population of this territorial collective which is the state do no more than draw in another manner the contours of the object with respect to which the international competences of the state are recognized (pp. 219–20).

In conclusion, it might be said that, for these authors, it is still possible to speak of the original and primitive liberty of states rather than of an international constitution which bestows legal identity on states and thereby integrates them into a legal community which they do not pre-date – the position, as will be seen, of Verdross and Simma. Combacau argues that international law consists of the limits on this primitive liberty. The law of the state (le droit étatique) is still unilateral, resting upon an exclusive and discretionary power (p. 226). It is hardly surprising that Combacau can point to and accept the consistent rejection by states of a right to secession as part of the right to self-determination of peoples (p. 262). In the same spirit of 'legal subjectivity and relativity,' as has already been seen, Sur returns to his point of departure. The primary concern is whatever is required for the security of the state, in the judgement of that state. So definitions of security are subjective. He believes it useful to say that it is international law that recognizes each state's right to security. Thus the state remains free to decide what this requires. The UN Charter cannot exclude individual traditions of security (pp. 620–1).

Both the roots and the implications of the French perspective need to be understood. Combacau appears to say (p. 265) that the fundamental feature of the development of the state can be traced to the eighteenth and nineteenth centuries when it came to be accepted that the state was a moral person in the sense of a corporate entity somehow separate in every way, that is from those who govern and those who are governed, and indeed from the territory governed.[38] This formal, immaterialist concept of the state represents well how the Combacau and Sur manual understands the state as a moral person, that is a corporate body, somehow as a company might be defined under national legislation. Obviously, shareholders, managers, and assets can change, probably infinitely, without affecting the

identity of the company. Legal significance is determined by legally valid acts of the state, which is completely independent of the identity of its members. The primary difficulty with this approach is what it conceals. Law can only be a matter of what states agree in dealing directly with one another. Yet conflicts in contemporary international society are recognized, or considered, by Combacau and Sur, to come with great frequency from the Hobbesean nature of international society.[39] Order exists only within states. Hence objective legal meaning can only be that defined by the state in relation to its own citizens. In the anarchy of relations with other states all is subjective.

This is the theoretical French position which Agnès Lejbowicz identifies as Hobbesean, quite simply in the sense that, as she puts it, in its relations with its own citizens the state functions as a corporate entity, a moral person, while in its relations with others it ceases to have this character and becomes simply an individual facing other individuals in a state of nature. It will be useful to present the critical explanations of Hobbeseanism by Lejbowicz in her *Philosophie du droit international*.[40] Lejbowicz analyzes the French position graphically.[41] The state which passes the frontier of its internal (i.e. national) law thereby de-juridicizes its fictive construction so as to make itself once again a natural person. The sovereign remains sovereign, not by virtue of any law, but by virtue of the power that it imposes on other states. At the international level the state ceases to be a fictive person, that is it ceases to represent; it simply is. Its proper aim is to preserve its being and to increase its power, a power which it exercises with violence, deception, economic wealth, no matter how. Lejbowicz insists particularly on the absence of a contract for international society.[42] That states are, as it were, placed equal to one another means that they are transformed from public persons inside their frontier to private persons at the level of international civil society, where the Hobbesean struggles prevail. This is precisely why Lejbowicz's calls for a reversal of Hobbes's decision to dispense with classical (i.e. medieval) natural law. Standards are needed which cross state frontiers and stress a natural state of fraternity, inspired by a return to a recognition of the other as the same, where all persons are accepted as having a common nature, and where inequality and difference promote sentiments of affection, rather than fear and the desire to coerce.[43]

The second, crucially Hobbesean, aspect of the French theory of the corporate body of the state is that, again following Lejbowicz,[44] it removes the distinction between the representative and the represented, so as to make it appear that they are unified. The mask of the

state causes to disappear the multiplicity of persons who have rendered possible the artifice of the state. The wills of all its members form only one will in the sense that the state can be considered to have only one head. No one citizen nor even all the citizens together can be taken to be the body of the state. It is Hobbes who makes his own the geometric representation of political space, a representation defined 'par le partes extra partes de la géometrie cartésienne . . .'

This is precisely how Combacau defines the state as an institution. He offers also a Hobbesean picture of the relationship of state power *with its own citizens*. The response of Combacau and Sur to claims of ethnic or other minorities to secession from their oppressors can only be to deny and reject them. Legal definition, in the sense of meaning and obligation, can only come from the state, and the state has to have an overwhelming capacity to suppress. It is only other states which can and sometimes do limit this power, but they will do so driven by a logic which is essentially similar.

The textbook *Universelles Völkerrecht* (1984 edition) by Alfred Verdross and Bruno Simma is widely regarded as a most authoritative statement of German/Austrian international law doctrine during the Federal Republic of Germany of 1949–89. It is at present not a dominant textbook in use in German law faculties, partially because as a source of reference it is sharply dated. Much greater place is given to two important collective works, *Völkerrecht,* edited by Ipsen, and *Völkerrecht*, edited by Vitzthum.[45] In the text by Verdross and Simma there is a commitment to the distinctively German view of the nature of the nation/*Volk* and its relationship to the state. This is an ethnic nation, which, at the time, did not enjoy full self-determination because of the partition of the country. The discussion of the relationship between state and nation is distinctive in European terms. Verdross and Simma argue (para. 380) that a state is not simply an association of people for individual goals, but is, once again, a *civitas perfecta* of those belonging to it, which provide the state the primary basis of its authority, a personal rather than a territorial jurisdiction. A population of a state must be a permanent association of people tied together by blood.[46] The state territory is not simply the spatial dimension of the jurisdiction of the state, but the secured space (*den gesicherten Raum*) of the people, which has organized itself into a state (para. 380). The root of the authority of the state is the *personality principle* of Germanic law, whereby every member of the tribe (*Stamme*) is under the authority of the legal order of its community. The authority of the state over everyone on its territory is becoming

more important but *it cannot push into the background* the personal dimension, which is the most important to the state, an association of persons based upon personal loyalty between the state and the nation (*Staatsvolk*) (para. 389). The authors stress sharply exactly what they are saying. Naturally, it would be possible to have a purely territorial view of the drawing of the boundaries of the world, but then there would be no *Heimatstaaten* and no *Staatsangehörige*, both concepts which suppose attachment of particular people to one another and to a place. Without this dimension the state would not be the organization of a people but an administrative region of a world state.[47]

This concept has profound implications for the detail of principles and rules of international law. A direct consequence is that a change of government does not touch the identity of the state. It is 'in der Geschlechterfolge fortlebende Bevölkerung,' which provides the material element of the state, that the continuity of the state is grounded. While Grotius is cited, the authors are really thinking of the German situation. They have also in mind the continuity of the German state between 1937 and 1990. This analysis leads into the most difficult subjects of contemporary international law. A discussion of associations without territorial authority (para. 404) focuses especially on movements of national liberation (para. 410). In the case where a power does not recognize its duty to allow a people which it dominates illegally to go free, this people has the right to realize its freedom through the use of force. This is affirmed in the 1974 General Assembly Resolution on the Definition of Aggression (Res. 3314/29). How can one justify this argument in the light of Article 2/4 of the Charter, and the objects of the Charter itself? It is a question of an international war and not a civil war as the majority of Western jurists believe. One can no longer suppress a revolt on the part of national liberation groups.

Much later in the manual (para. 509) there is an extensive consideration of the principles of respect and promotion of the right of self-determination of peoples. In terms of a common European history the oppression of one people by another begins with the Dutch and the Spanish in the early seventeenth century. Oppression by one people of another leads to the latter insisting on withdrawing from the political community which it constitutes with the former. When India claimed in its ratification of the Covenant of Civil and Political Rights, with respect to Article 1 which refers to the right of self-determination of peoples, that it applied only to people under a foreign jurisdiction and not to countries already independent, the Federal Republic replied

formally in August 1980 that the right of self-determination is valid 'für alle Völker und nicht nur für Völker unter Fremdherrschaft . . .' Any restriction is contrary to the clear expression of the Covenant (para. 510). The central idea is that where a people (*Volksgruppe*) suffers discrimination, with the result that the people is no longer represented fully, the sense also of the 1970 Declaration of Friendly Relations Among States applies. There no longer exists a government which represents the entire people in an equal manner. Examples are Bangladesh and Northern Ireland. Article 1/4 of the 1977 1st Protocol to the Geneva Conventions of 1949 reaffirms the right of military resistance on the part of discriminated peoples. The only restriction the authors seem to allow in their argument is that it can happen that certain peoples are so small that they will, in any case, only seek autonomy (para. 512). They accept that the UN practice opposes what they are saying. Once exercised, the right of self-determination is exhausted in the UN view. However, such a perspective ignores the well-known history of how the post-colonial states were constructed in disregard of ethnic distinctions. More fundamentally, the notion of the exhaustion of a right, once exercised, has no scientific basis.[48]

Remaining within the contemporary German context, it is proposed to present Karl Döhring's views of the right of self-determination of peoples in his *Völkerrecht*.[49] While the latter text, written by an international lawyer, takes the form of a manual it provides a much more exhaustive and penetrating analysis of the implications of an ethnic grounding of the state. The central aim of the work is to provide a systematic account of the legal implications of the self-determination of ethnic peoples.

Döhring offers a rigorous logic to his defense of the right to self-determination of peoples as a human right. It is possible for a majority within a state to coerce into submission a minority, as a matter of empirical fact. However, this power brings with it no compelling authority. There is no force in the argument that every life in common requires acceptance of rules because this leaves open the question whether any particular life in common is necessary. That is, the presence of two ethnic groups in one state does not have to persist. Contemporary revolutions and wars show that continuing to live in peace together is not always desired. The people of a state (*Staatsvolk*) does not have to be homogeneous, but if it is not, the state must be able to postulate values which can hold together the cultural differences of its peoples. Those states which are not able to will not endure (they are *nicht überlebensfähig*).[50]

The starting point of this analysis is that the greatest threat to security of a state is from within, not from other states. The greatest cause of this threat is the unrepresentative, coercive state which oppresses its large ethnic minorities. Döhring treats the UN, a framework of collective security, as largely irrelevant to the types of problems caused by internal repression of one ethnic group by another. Döhring defines ethnic groups as distinguished by language, religion, race, and culture and as situating themselves on a distinct territory. Döhring, like Verdross and Simma, has already defined the population element of a state as a *Schicksalsgemeinschaft* and he treats the right of self-determination of peoples as a fundamental principle of *ius cogens*. Since the people are the essential substrate of a state, it is not surprising that it can survive the collapse of the state (e.g. the Somalis and Somalia). The right of self determination of peoples is not confined to the colonial world and it is clear both that a right must bring with it the means to defend it – or it is not a right – and that collective self-defense must mean the right of another to come to one's assistance, whether it is an individual or group right that it violated.[51]

If one returns to Döhring's starting point, he has placed the active obligation on a multinational state to ensure a value framework to bridge cultural difference. He recognizes the dangers of his approach in considering the defensive right of self-determination in the context of the definition of aggression. In 1974 the relevant UN resolution makes an exception to the illegality of the use of force which effectively exempts the typical conflicts of the time.[52] Equally, a state which suffers a revolt by a minority claiming a right to self-determination will resist its dissolution by making the same claim. There will be a collision of norms as in constitutional law and the principle of *ius cogens* will give no direction.[53] Nonetheless, for Döhring the starting point remains that the empirical coercive power of the majority within an existing state is merely that. The democratic aspect of self-determination means, in Döhring's view, that the state has a duty to give a minority the institutional possibility to express itself, in order to be able to determine the will of the minority group.[54]

One cannot escape from ethnic conflict and violence into the illusion that the fiat of the state, as a matter of legal epistemology, can resolve such conflict. As Bartelson has brilliantly explained,[55] Hobbesean, statist thinking has its roots in a Renaissance politics of conspiracy and espionage of sovereign princes. States, in this model, do not approach one another as comparable institutions retaining their character as moral persons, in the municipal law

sense. Bartelson has explained how the modern state, born of the wars of religion, wants to forget the birth that has traumatized it. This is the real meaning of the desire of Combacau to argue that one need not look to a theoretical origin of the state because its concrete foundation preceded the emergence of the concept of the state, the birth of which remains non-justiciable (p. 265). The state has become, as a subject of French public law, the subject of the distinction made by Descartes between the immaterial subject and the material reality, which it observes and analyzes. In this scheme knowledge supposes a subject and the subject is the Hobbesean state which names but is not named, observes but is not observed, a mystery for whom all has to be transparent. It is the first problem of this theory of knowledge to find security, which lies, in a one-way rational control and analysis of others by itself.

In other words, the violent Hobbesean state of nature is self-justifying, made inevitable by its own theory of knowledge. There is no place for a reflexive knowledge of self, save for an analysis of the extension (spatial) of the power of the sovereign (i.e. geopolitically) up to the frontier. Other sovereigns are not unknown in an anthropological sense, but they are enemies with interests in contradiction, whose behavior has to be measured and calculated. The mutual recognition of sovereigns does not imply the acceptance of an international order in common, but simply a recognition of what is similar but territorially separated, an according of reputation and a limited security.

Lejbowicz tries to deconstruct and reconstruct this French Hobbesean perspective. The state as such has to be left behind. It is because states confront one another as *facts*, and not as corporate bodies or *moral persons*, that the identities of the persons who compose them are fundamental. So Lejbowicz argues that where these brute facts confront one another, one must return to the natural state of fraternity, which makes it impossible for humanity to be captured by one person alone. The inspiration of the *ius naturale* is that we return to recognize the other as similar, as reflections of the self, images of the self to be found in others because we have a common origin. It is the forces of exclusion which found state particularism, the opposite of mutual comprehension. The enemy is not on the outside but within the self, an evil which each has to rework. State law creates frontiers but without a human space between them. It is the confusion of languages which God has created which ensures an inevitable anthropological distance among peoples and engages them in a perpetual quest for mutual understanding. 'L'imaginaire du relationnel se

construit avec le *ius* naturalisme de la *societas amicorum* sur le présupposé d'un milieu de communication déjà ouvert . . .'[56]

Lejbowicz thereby provides a wider context of the Western humanist tradition in which the arguments of Bartelson need not appear so alarming. Bartelson suggests the inevitability of accepting peoples, not states, as a starting point for the definition of international society. Since the revolution of linguistic nationalism of Herder and Vico there is no point of return. The exercise of giving a name, of which juridical recognition is only a part, refers directly to language and with it, to the history of the nation. As we have seen, Bartelson has argued that there are no mysterious powers, detached from society, which can determine a signification by decree, by the employment of words which reflect their monopoly of power and their capacity to coerce. In this sense Döhring is stating the obvious in distinguishing the power from the authority of the majority controlling a state apparatus. Instead of the state it is man who emerges from the subordination to the Prince to become the sovereign of his own representations and of his concepts. The words are not *there*, as they were for Descartes, to represent passively, functioning as a mirror to reflect something external to the subject. It is the activity of the subject itself which creates its own world of experience and which gives itself the words with which to express itself. So language is a reflection of the experience of the individual and of the collectivity to which it belongs. Thus it is language which becomes the subject of interpretation. Language in its dense reality can explain the history of the institutions, which are rooted in that language. The world of institutions is made by men and thus one can arrive at a comprehension of them *through a knowledge of the self*.[57]

Notes

1 *ICJ Reports* (1986) 554 and especially para. 20.
2 Ibid.
3 *International Law Reports* 92 (1994) 170.
4 Ibid., 167–8.
5 UNGA Declaration on the Principles of Friendly Relations among States GA Res 2625, 25 UNOR (1970).
6 See a review of the debate in *Democratic Governance and International Law* ed. G. Fox and B. Roth (2000).
7 The seminal study of the influence of this approach on international law is Glanville L. Williams, 'International Law and the Controversy Concerning the Word Law' in the *BYBIL* (1945) 146 ff.

8 A. Cassese, *International Law* (2001) 47.
9 Ibid., 13.
10 Ibid.
11 Ibid., 48.
12 Dietmar Willoweit, *Rechtsgrundlagen der Territorialgewalt* (1975), esp. 123–5, 126, 129–31.
13 Ibid., 275–6.
14 Ibid., 306–7, 349–50, 360–1.
15 G. W. Gong, *The Standard of Civilisation in International Society*, (1984), 16.
16 Ibid., 36.
17 Ibid., 43.
18 Ibid., 47.
19 (Perm. cf. Arb 1928) 2 UN Rep. Intl. Arb. Awards, 829.
20 James Crawford, 'State Practice and International Law in Relation to Secession,' *BYBIL* (1998) 85 at 114.
21 Ibid., 95 and 113.
22 Ibid., 85–6.
23 Ibid. A. Carty, *The Decay of International Law* (1996) 55–6.
24 See references 12–14 above, and the work of Willoweit. The outcome rests on the exclusive option for Hobbes over the natural law tradition and one will have to come back to it again in this chapter and also in the next.
25 Crawford, 'State Practice and International Law in Relation to Secession,' 102–3.
26 Ibid., 107.
27 Ibid., 107–8.
28 J. Bartelson, *A Genealogy of Sovereignty* (1995) 128.
29 Ibid., 110.
30 Ibid., 130–1. Bartelson applies these remarks to Vitoria.
31 Ibid., a summary of the whole of Bartelson's chapter 5, 'How Policy Became Foreign,' 137–85.
32 Immanuel Kant, *Perpetual Peace and Other Essays*, trans. T. Humphrey (1982) 355.
33 A. Carty, 'Why Theory, Implications for International Law Teaching,' *Theory and International Law, An Introduction* (1990) 73 at 97–9.
34 Bartelson, *A Genealogy of Sovereignty*, 188–201.
35 Jean Combacau and Serge Sur, *Droit international public*, 1st edition (1993, the edition used here unless otherwise stated: there is now a 4th edition, 1999).
36 These perspectives of French foreign policy elites are culled from two volumes: Marie-Christine Kessler, *La Politique étrangère de la France, acteurs et processus* (1999), esp. 153–65; and Maxime Lefebvre, *Le Jeu du droit et de la puissance: Précis de relations internationales* (1997)

esp. 68, 72, 105, 123–30, 151, 158–60 and 192–205. Both authors retain close links with the Institut des Sciences Politiques, Paris, the pathway for students, through their examinations, to the École National d'Administration and the Ministry of Foreign Affairs. I have also explored the impact of these themes on French international law doctrine in numerous articles, and, in particular, 'L'Union européenne à la recherche d'un droit des relations extérieures,' in *Union Européene: Intégration et Coopération*, ed. Alain Fenet and Anne Sinay-Cytermann (1995) 245–56.

37 This theory of the state, it will be argued in the next section, is, in terms of the history of the theory of the state, early modern, absolutist in character. As it is the lynchpin of the whole presentation of a French position, in the sense that both an epistemology of law and particular rules on the use of force are seen to follow from it, it is essential to consider whether the views of these authors are unrepresentative of their international law colleagues in France. In Nguyen Quoc Dinh, Patrick Daillier, and Alain Pellet, *Droit International Public*, 6th edition (1999), the authors say that for the definition of the elements of a state, among the terms population, nation, and people, only the first is accepted. Disagreement is total on the meaning of the term 'nation.' The spirit of this analysis is the same as with Combacau and Sur. The effect of a right of secession, vindicating a right of self-determination, would be unlimited territorial claims. Once a state is created it confiscates the rights of peoples (para. 267, pp. 407–8). In the recent collective volume directed by Denis Alland, *Droit International Public* (2000) Hervé Ascensio provides a very lucid third chapter on the state as a subject of international law. Using virtually identical metaphors to Daillier and Pellet he speaks of the right of self-determination of peoples as a matter which may be exercised at a particular historical instance, after which the people effaces itself once again behind the state (para. 91). He draws a distinction between the sociological and juridical definition of the state, one which Kelsen had tried to overcome, and he prefers the former, which reflects the factual, historical origin of the state, that its coming into existence is not governed by international law (paras 73–5). The drive for self-determination may be one fact contributing to the appearance of new states. In his *Droit International Public*, 4th edition, Pierre-Marie Dupuy gives extensive attention to the relationship between the classical definition of the state and the right of self-determination of peoples, saying that the problem is difficult because the latter is accepted as legal and as applying in all situations, if one follows the letter and the logic of the international legal texts (para. 133). He looks to international recognition as a solution, with the qualification that there are no clearly objective criteria to identify what is a people. While international law is no longer indifferent to issues of legitimacy and human rights, it will still be

a question whether the traditional elements of the state, which express effectivity, are reunited in a particular case (paras 30–4, 130–2). Dominique Carreau's *Droit International*, 5th edition (1997) treats the state in the juridical (Kelsen) sense as a sphere of jurisdictional competence accorded by an international legal order and does not look any further into any of the issues examined here.

38 An argument which has been developed by his student E. Jouannet in her doctoral thesis 'L'Emergence doctrinale du droit international classique, Emer de Vattel et l'école du droit de la nature et des gens' (1993).

39 Jouannet provides an interesting link between the corporate nature of the state and the shaping of rules by states in their relations with one another as corporate bodies. She attributes this development to Vattel. The difficulty is that Vattel is a follower of Locke and did not have a 'realist' view of international society. For reasons of space it is not possible to discuss here more fully Jouannet's views, and, anyway, there is no spirit of Locke in Combacau and Sur. However, the criticisms made here of their approach do not have the same force as applied to Vattel. For another history of Vattel tracing Locke's influence, see Francis Ruddy, 'The Origins of the Ideas of Vattel,' PhD thesis, University Of Cambridge (1969).

40 Presse Universitaire de France: Paris, 1999.

41 Lejbowicz, *Philosophie*, 143ff.

42 Ibid., 405ff.

43 This theme will be pursued further in the final section.

44 Ibid., p. 141ff.

45 *Völkerrecht* ed. Knut Ipsen, 4th edition (1999), and *Völkerrecht*, ed. Wolfgang Graf Vitzthum (1997), with a second edition in preparation. Throughout the paper, account will be taken of the positions presented in these works, bearing in mind, at the same time, both their collective and reference (informational) character.

46 'Bei einem Staatsvolk muss es sich um einen dauerhaften Personenverbund handeln, der in der Geschlechterfolge fortlebt . . .' Different from standard British and French definitions. The authors cite a German court case which refers to the celebrated strong concept of the population as a *Schicksalsgemeinschaft* (a community of destiny).

47 It is here that the collective and reference character of the other textbooks present problems. In Ipsen's work, chapter 2, on the state as the normal subject of international law, stresses the unity of a state not in terms of language, culture, or religion, etc., but simply their living together under a common legal system (para. 5). However, the long chapter 6 on peoples (*Völker im Völkerrecht*) by Hans-Joachim Heintze is much closer to the main text, especially para. 27.4.

48 This has remained a virtually standard German position if one considers the whole chapter by Heintze *Völker im Völkerrecht* cited above,

which is a systematic forty plus-page treatment. While Heintze regards appeal to an external right of self-determination as exceptional, compared to the preservation of the territorial integrity of states, he gives general grounds for the exercise of the right. In contrast in Vitzthum's work in chapter 3, Kay Hailbronner in *Der Staat und der Einzelne als Völkerrechtssubjekte* dismisses the legal character of a right to self-determination in less than a page (3.24–5). At the same time, he recommends a practical conflict-prevention strategy in the face of demands of collective groups. Appropriate autonomy measures can anticipate conflict between a state and its minorities (3.26–9). This approach is grounded in a functionalist assumption that stable state structures should ensure a Law of International Relations which guarantees individual and, where appropriate, minority group rights (3.4–6).

49 Muller Verlag: Heidelberg, 1998.
50 Döhring, *Volkerrecht*, 3–4.
51 Ibid., 28–9, 71–3, 197–8, 242–6, 330–7.
52 Ibid., 240–2.
53 Ibid., 324.
54 Ibid., 335.
55 Bartelson, *A Genealogy of Sovereignty*.
56 Lejbowicz, *Philosophie*, 407–16, quotation at 416.
57 Bartelson, *A Genealogy of Sovereignty*, 188–201.

4

THE USE OF FORCE

The Classical International Law Tradition

In his magisterial introduction to international law, *The Law of Nations*, James L. Brierly quotes at length the French international lawyer Albert De Lapradelle on the significance of Vattel, whose text *Le Droit des gens*, published in 1758, is usually regarded as the standard founding statement of modern international law. The Frenchman praises Vattel for having written in advance of the events which the book represents, the principles of 1776 and 1789, of the American and French Revolutions. Vattel is credited with projecting onto the plane of the law of nations the principles of legal individualism. Vattel has written the international law of political liberty.[1]

Brierly comments astutely that the survival of the 'principles of legal individualism' has been a disaster for international law. The so-called natural independence of states cannot explain or justify their subjection to law and does not admit of a social bond between nations. Vattel has cut international law from any sound principle of obligation, damage which has never been repaired.[2]

It could be said that there is nothing in the critical legal studies movement about the law relating to the use of force that has not already been said clearly by Brierly in relation to Vattel. Brierly's views are worth repeating precisely because contemporary statements about Anglo-American *unilateralism*, above all in the context of Afghanistan and Iraq, however worthy and true, are statements of the obvious which do little to advance understanding. Focus will be on Brierly's critique of Vattel on the use of force since it is most relevant.

Vattel makes each state the sole judge of its own actions, accountable for its observance of natural law only to its own conscience.[3] This reduces natural law to 'little more than an aspiration after better relations between states.'[4] For instance, by necessary law (natural law) there are only three lawful causes of war: self-defense, redress of injury, and punishment of offences. By the voluntary law (effectively

the positive law, based on consent) each side has, we must assume, a lawful cause for going to war, 'for Princes may have had wise and just reasons for acting thus and that is sufficient at the tribunal of the voluntary law of nations.'[5]

Kant has already been quoted for disparagingly saying of the international law tradition, from Grotius to Vattel, that 'no example can be given of a nation having forgone its intention [of going to war]' because of this tradition. Nations do not and cannot stand under any common external constraints.[6] However Brierly is going further and telling us that the very categories of thought which the international law tradition, since Vattel, offers makes it impossible to think of that law effectively restraining the recourse of states to violence.

This is not helped by the ambiguity that appears to surround Vattel's position. As Bartelson also stresses, the argument that mankind is divided into separate states does not overrule universal natural law, now reinstated in the rationalist context of Enlightenment philosophy.[7] Bartelson quotes Vattel that each nation 'may be regarded as a moral person, since it has an understanding, a will and a power peculiar to itself; and it is therefore obliged to live with other societies or states according to the laws of the natural society of the human race.' The difficulty remains that this universal morality is not immediately binding upon the external conduct of states. Again, quoting Vattel, 'each has the right to decide in its conscience what it must do to fulfill its duties; the effect of this is to produce before the world at least, a perfect equality of rights among Nations'. This leaves the international law tradition with a contradiction. Without sovereignty, says Bartelson, after Vattel, the state cannot be understood as a moral person, but without a wider sense of universal values, this person cannot be sovereign.

This dilemma is what is meant by the question whether international law is binding, whether treaties are legal instruments, and, especially, whether sovereignty can be legally limited. It is attempted to argue that Vattel's idea of sovereignty does not negate the very idea of international law. The profession never tires of repeating that states declare their adherence to international law. The difficulty is clearly that the doctrine of legal equality means the interpretation of the law given by any and every state has equal value. Therefore, the principle of auto-interpretation of the law is inevitable, which means a total relativity of interpretations. The very idea of legal obligation is negated precisely by the universal willingness of states to appeal to law to vindicate their positions. So the evidence of

declared adherence to international law on the part of states is the problem that confronts us rather than the evidence that reassures us.

THE CONTINUANCE OF THE CLASSICAL TRADITION

So, by way of typical illustration of the actuality of this apparently theoretical difficulty one need look no further than the most internationally reputed standard textbook of international law. The editors of Oppenheim's 9th edition of *International Law* define international law, as any other law, in social terms as rules of conduct accepted in a community by common consent and enforced by an external power (para. 3). They rely upon the classical distinction between law and morality (para. 17) in terms of the latter applying to conscience and the former being enforced by external authority. A clear weakness of international law, recognized by the editors, is that the enforcement mechanisms of international law continue to be unsatisfactory and the Security Council does not offer an adequate substitute. Yet the same editors treat the controversy about the legal nature of international law as unrealistic (para. 4) simply because states recognize that their freedom is constrained by law. This remark is accompanied by the observation, assigned to a footnote, that such a position is not inconsistent with the fact that states may differ as to precisely what rules that law prescribes.

It may be that the editors are not concerned so much about the frequent resort to unilateral action by states in the form of self-help or special interpretations of the right of self-defense, etc., because it must always be possible to have judicial or Security Council review of such decisions if the idea of law is not to be eliminated from the scene (para. 127). That is, relevant officials could, conceivably, appear who would apply the international norms.

However, the practical implications of this have to be seen in the wider context of 'authoritative' mainstream doctrine as represented in the 9th edition of Oppenheim's *International Law* edited, *inter alia* by an FCO First Legal Advisor, Sir Arthur Watts. The editors of the 9th edition of Oppenheim, Sir Robert Jennings (an ICJ judge as well as an academic) and Sir Arthur Watts, regard the UN as having the potential of a complete legal system, but in the meantime 'we are not that far,' particularly insofar as concerns enforcement. Using the framework of the 1970 UN Declaration on FRAS (Friendly Relations Among states) and superimposing it on the notion of the nineteenth-century fundamental rights of states (Pillet),[8] the editors adopt the

rationalistic concept which underlay international law in pre-Charter times. So (para. 119), independence as a legal concept entails that violation of, for instance, the territorial sovereignty of another state may occasionally be justified on grounds of self-defense or by the failure or inability of the invaded state to fulfill the duties of control over its territory which are the corollary of its right to territorial sovereignty.

The difficulty, of course, is that each state will, in accordance with the legal principle of equality, claim the same right, and thereby cancel out the legal effects not only of all other legal claims, but also its own. The editors, and the mainstream of the profession, have always been aware of this difficulty and believe they can counter it by making a distinction between the claim of a right to self-preservation and a right to self-defense. While self-preservation as a legal concept is ruled out as illogical, the necessity of safeguarding the integrity of the State may, in strictly limited circumstances, justify acts that are otherwise wrongful (para. 126). Article 33 of the ILC draft articles on State Responsibility is the occasion for differing views. But maybe when there is only one means to safeguard essential interests of a state against grave and imminent peril, and there is no serious impairment of the essential interest of another state and no violation of *ius cogens* by using it (para. 127), force may be used. In any case, in the view of the editors, self-defense against subversive armed forces can involve crossing the border to deal with intended attackers, etc. Standard nineteenth-century cases are set out, such as the sinking of the Danish fleet at Copenhagen as well as the sinking of the French fleet at Oran in 1940.

What is more, anticipating an attack is not necessarily unlawful in all circumstances (para. 127, continued). In conditions of modern hostilities it is unreasonable to expect the state to wait. In practice it is for every state to judge for itself in the first instance whether a case of necessity in self-defense has arisen. There are practical difficulties in modern technology, for example aircraft approaching in what appears to be a hostile manner. The editors make no judgments about a number of incidents which they set out in a value-free manner: Suez 1956, Cuba, Aden, South Africa, Vietnam, Iraq, etc. So, it appears that the editors consider that forceful intervention is not necessarily illegal. Justifications have been the protection of citizens, as Britain in Suez, Israel at Entebbe, etc. (para. 131). That is, where national lives are in danger and the territorial authorities are unable or unwilling to protect those at risk, action may be taken which is, in any case, not inconsistent with the purposes of the UN Charter.

A FURTHER GLANCE AT VATTEL'S HERITAGE

It has to be stressed once again that Vattel is the key figure of international legal modernity. Of course, he is not the originator of legal modernity itself. Nor did he necessarily understand the implications of the innovations that he made. One will have to come to these questions in a later part of this chapter. For the moment it is his place in the international law tradition that one wishes to highlight. As an historian of international law, Jouannet demonstrates the same continuity of the medieval legal method throughout the seventeenth and early eighteenth centuries from Grotius to Vattel. All the major legal figures continue some version of the medieval method. The main figures are Grotius himself and what Jouannet describes as his disciples, Rachel, Zouche, Textor, and Bynkershoek.[9]

The reason why international law had not until Vattel become an autonomous discipline in its modern recognizable form is rather surprising. Jouannet traces how none of the earlier jurists conceived of the state or nation, words used interchangeably, as a corporate entity distinct from the person of the government or the Prince. There are traces of the idea of the state as a corporate entity in the writings of Hobbes, which have also exercised an influence on Pufendorf.[10] However, even these two writers remained with the concept of government alone rather than developing a concept of a corporate entity which embraced both the governor and the governed. The elements which would make up the modern state in international law, government, territory, and population, remained the property of the Prince. He *had* a territory and a population, in a patrimonial sense. Such a personalized concept of authority directs attention to individuals and favors the retention of the medieval idea of a common law of human beings applied to the leaders of nations. Grotian-style erudition prevails into the eighteenth century to regulate the affairs of princes in their relations with one another, but also in their domestic and even private affairs.

It is with the Vattelian critique of Christian Wolff that one arrives at the modern conception of international law, where sovereignty as a legal concept comes to play a central part. Absolutely central is the notion of the corporate character of the state. As a legal entity, it has to be separate from both government and governed. It is the state, and not the government or Prince, which is subject to international law. It is and can be subject to international law only if it is sovereign, that is, equally independent of all other states.[11] What Jouannet is, above

all, anxious to stress is that law should have a dualist character in what she calls the classical form of international law. It is essential to the idea of the corporate character of the state that there should be no relations of individuals with one another across state boundaries. All the relations of individuals, for the purpose of international law, are absorbed into the corporate identity of the state, which then has legal relations with other states. In this way it is the sovereign equality of independent states which defines the object and scope of the rules of international law.

Yet Jouannet sees no difficulty in the Vattelian sovereign being integrated into an international legal order. The lack of difficulty is hardly surprising because this new legal order is made by states specifically for their relations with one another.[12] It is because states have no rights over one another that they have need of a law which recognizes that they are independent and equal.[13] Jouannet appears to see the entire exercise as a taxonomy of what relates or properly belongs to the rights and duties of nations rather than individuals. The idea that there should be rules specifically designed for the character of sovereign states can hardly pose problems of a legally binding character.[14] The aim of this taxonomic exercise is to register a break with the Roman and medieval tradition of law. The progressive character of this law is that it incorporates the two great principles of liberty and equality of states as the very basis of the society of nations, in place of the *genre humain* (human kind) of the naturalists. Now the nation can govern itself without dependence upon what is foreign to it.[15] The constant theme of this argument is the corporate character of the sovereign. Because sovereign nations deal only directly with one another, they can only see one another as societies of men of whom all the interests are held in common. It is not a law of nations derived from human nature which rules them, but a law derived from the particular nature of the state.[16]

It is interesting to give a prominent place to Jouannet's argument because international lawyers are so little troubled by the concept of sovereignty. She is aware of the problem of subjective appreciation but manages to make it appear that those who stress it misunderstand the structure of international law and lack the technical expertise to understand how it is supposed, following its own nature, to function. Jouannet admits that Vattel keeps the principle of the subjective appreciation of each state in the application of the law,[17] but considers it is unjust to make him responsible for the increasing voluntarism of international law. Voluntarism means that the entire body of international

law depends upon the continuing consent of states. They can, at any time, cease to accept that a rule binds them, and even cease to recognize other states as subjects of the law. Vattel is not responsible for such a view. He merely introduces the logic of Hobbesean and Lockean individualism into international law, in terms of the liberty and sovereignty of states as the foundation of international law.[18] A doctrine of the autonomy of states is not a doctrine of absolute or unlimited external sovereignty. It is not a non-submission to a superior juridical order but an autonomy of a political entity *vis-à-vis* other equally independent entities.

The root of the confusion, in Jouannet's view, is to have made a too rapid combination of the question of the application of international law with the decentralized structure of the community of states. There is no compulsory international adjudication. So states have to interpret for themselves the extent of their rights. She says the question of the subjective appreciation of the law is not an aspect or logical consequence of voluntarism in international law, a doctrine that all law is a product of state will, but arises from the conditions for the application of the law in a decentralized international legal order. International law is a universal abstract law, but appreciated unilaterally because subjectively. It therefore functions in practice as a series of reciprocal and bilateral interpretations given to it by states.

Vattel simply marks a reflection of a change at an international level which had been occurring generally in legal culture – a movement towards the individualization and subjectivization of law, combined with a realist vision of international relations where states have a mission to act to assure their security and preserve their interests. It is not Vattel who introduces this subjectivity into international law. It is simply an unavoidable fact of international law in the absence of any supra-state power. So, in the beginning and middle of the twentieth century it is not this subjectivist decentralized appreciation inherent in the structure of the international community which is the problem, but the legitimacy of the use of force which accompanies it.[19]

THE TWENTIETH-CENTURY REVOLT AGAINST STATE SOVEREIGNTY: THE FUTURE FOR INTERNATIONAL INSTITUTIONS

The war of 1914–18 greatly upset the confidence of international lawyers in the viability of a legal order which left appreciation of violations of rights and methods of vindicating them entirely within the discretion of sovereign states. The response which it is intended to

highlight as a reaction to this comes from within the same legal political tradition as Vattel's: democratic constitutionalism. In the first instance, it does not have to be read as a statement that international organization exists, but rather as a statement of what legal democratic theory would require at the international legal level. The fundamental epistemological condition is that law depends upon what the people express through their constitutional organs, i.e. through the state. At the international level, this means reproducing the characteristics of a state globally. This is the only possible democratic production of legal meaning. At present, international lawyers are left troubled by the in-between character of an incomplete international institutional order, wherein state sovereignty keeps seeping through.

After 1918 Europeans wished to conceive of the rule of law as being capable of defining the spheres of competence of the state. In Austria the *Stufenbau Lehre* (Legal Ladder/Steps) approach conceived of an ideal legal structure in terms of state responsibility. Just as order within the state depended upon the capacity to determine the competences of specific state organs constitutionally, so international order depended upon the existence of an international constitution which could determine the competences of the state in international relations. State responsibility was tied to the notion of executive responsibility towards a parliamentary regime, and to reproduce this regime internationally it was necessary to give priority to international over national law by creating international institutions which could limit effectively the legal competences of states. Such institutions could function as parliaments supervising states. [20]

The chief exponent of the ideal of an international constitutional order was Kelsen. He appreciated the historical perspective which had to be overcome. To argue that state power could look to itself rather than to a constitutional title for its competence to act is to hark back to the spirit of absolutism.[21] The notion that physical, or whatever, state power as such could legitimize an action is to leave the way open to the idea of *raison d'état*, in the sense in which a Renaissance disciple of Machiavelli would have understood this, that is, as the capacity of the Prince to put his concept of the public safety of the state above all considerations of law and morality. Kelsen's aim is to construct a barrier between modern constitutionalism, democracy guaranteed by positive law and the historical origin of European states, which was in absolute monarchies.[22] It is the latter who actually consolidated the power which constitutionalism is now supposed to democratize. Kelsen is a theorist of international law who does

recognize that there is a danger implicit in the classical notion of the state, whereby sovereignty does create a threat to the obligatory character of international law.

A neo-Kantian epistemological perspective is an essential part of Kelsen's critique of the traditional legal thinking about the state. Power, and hence state power, as an empirical concept has no legal significance. The notion of command has legal meaning/significance only in terms of a normative order which attributes roles: who may command and who must obey.[23] In international terms this implies a break with Vattel, who took the independence and equality of states for a natural fact. As Jouannet has said, it was possible to deduce the basic rules of law from the nature of the state. For Kelsen the coexistence of states is only legally conceivable on the basis of the existence of an exhaustive association which determines the limits of the validity of competences rather than powers, which are attributed to states. Such a legal framework puts states on the same juridical plane as their own provinces and communities in their own federal law.[24] That is to say, on a par with constitutional-administrative law, the state should be considered not as the highest instance, but as a *relatively high* instance, in a scale of juridical instances – hence the metaphor of *ladder*, or *Stufenbaulehre*.

The difficulty, of which Kelsen was aware, remained that power structures of international society did not automatically conform to his ideal construction for the future. Every legal system must be able to say which are its subjects, i.e. literally subject to it. A basic, real question is whether states are dependent upon an international order for their existence or whether they create themselves out of their own forces. Kelsen's response has the appearance of a play on words which is left to plague the whole structure of contemporary international law. The only juridical, internationalist way to answer the question is to suppose the existence of an international law norm which posits the acceptance of the legal character of any entity which succeeds to establish itself durably.[25]

Kelsen has to insist that the objectivity of a legal order, in the sense of its validity, has to be independent of acceptance by its subjects, just as the rule of law at a national level cannot depend upon its subjects. This leads him openly into the construction of a *civitas maxima*, a universal international law which stands over against the rules which states have consented to, and which grounds their validity. This is the same *civitas maxima* which Wolff constructed and which Vattel rejected as non-existent. It recognizes that the idea of law attaches to

the notion of the constitutional state as such, so that the only international legal framework which can adequately encompass the modern state has to be a world constitutional state. This, in the age of modernity, is the only construct which can be a substitute for the medieval notions of the ideas of a continuing Roman Empire, with its tradition of legal naturalism, of a *ius gentium*. Kelsen is not at all committed to claiming that such an order exists, but it is the only conceivable juridical pathway to overcome the absolutist, monarchist Machiavellian state at the international level.[26]

Once this legal ideal is set, the task is to reinterpret the foundations of international law accordingly and to overcome the obvious deficiencies of existing, positive international law, that is merely the legal rules to which states *have consented*, exposed as they are to the dangers of voluntarism. The first stage is easy. One may simply say, almost as a play on words, that treaties are binding, as are rules of general customary law, because there is a basic norm, i.e. derived from the idea of a *civitas maxima*, that confers legal validity upon the exercise of state consent which finds expression in such treaties and customs.[27]

However, the problem is not simply the creation of rules of law, but their interpretation and their enforcement. How does the *civitas maxima* work itself out at this stage? The *Stufenbaulehre* insists upon one simple and new way of looking at states. They are not sovereign entities but organs of the international legal community to which certain competences have been transferred. The difficulty which immediately emerges is that there are, in fact, nothing but states, that to regard them as organs of the international community is simply an international lawyer's way of speaking. Kelsen is fully aware of this fact. He is merely trying to conceive of the basic logical requirements for the construction of an international legal order. He appreciates, as does Jouannet, that there are problems with the very idea of a legal order, where there are no institutions for the interpretation of the law independent of the states themselves, and equally no mechanisms for the enforcement of legal obligations apart from the states.

So Kelsen embarks upon two important further arguments, concerning the place of war in the international legal order and the place of the judiciary in the interpretation and in the creation of legal norms. The intention at this stage is to explain critically how Kelsen, as a representative international lawyer, develops his ideas. War is a common fact of international life. If international law is to have credibility as a legal order, in Kelsen's view, it must integrate this fact into

its interpretative framework. If war is to be evaluated from a juridical perspective it can only be as a sanction that international law furnishes for the enforcement of law against violators of the law. Traditional doctrine viewed war as permissible. States could wage wars as an instrument of national policy, quite simply to seize territory and resources from other states. Anxious to eliminate such a traditional concept of sovereignty Kelsen claims that war is regulated by international law.[28] By this Kelsen means that only where a state has suffered an aggression – simply a violation of its rights – has it a discretionary power to react under international law, i.e. a discretion to enforce its right. In this sense war is legally objectivized. War becomes an institution created by the law to put the law into force.[29]

To claim that a state is able, at its discretion, to declare war, apart from having suffered a legal wrong, would signify the end of the idea of international law. So Kelsen tries to affirm that a state cannot employ the use of force until there has been first a violation of the law. However, the problems of interpretation and application are linked. The lack of an independent instance which can verify objectively whether there has been a violation of law remains. Yet somehow Kelsen believes that such an objection does not prevent a theoretical construction of war being considered as a coercive act, as a sanction, to enforce international law. He insists upon construing the state which has suffered a legal injury, and responds to it through the use of force, as functioning as an organ of the international legal community.[30] In pursuing this line of argument Kelsen is firmly determined to replace the traditional concept of sovereignty with a procedural approach to law which ensures that the possibility for initiative for states is clearly regulated.

The underlying motive of this approach to international law remains clear. All law must have a democratic foundation in consent. If legal subjects are to be allowed, within an admittedly primitive or decentralized system of law, to use force, this can only be in terms which are clearly agreed in advance by the legal community. Hence, the approach which Kelsen adopts, in order to determine whether the minimum conditions of a legal order exist, has enormous resonance in the profession and indeed can be said to be the only approach which is regarded as conceivable.

Kelsen is able to see that a simple prohibition on the use of force is not enough to settle when states may go to war. Logically, it will provide an answer. Either states use force illegally in contravention of the status quo or they act legally by using force to defend it. However,

some mechanism has still to be found to develop and adapt the law in the existing, primitive, and decentralized international society. The solution for Kelsen will be a system of obligatory jurisdiction which would issue judgements that an Executive would be required to implement. This would overcome the obvious fictionality in speaking of states which decide to use force to revenge a violation of their rights as doing anything other than 'taking the law into their own hands'. If a court had to decide whether there had been a violation and could do so in taking a dynamic attitude to the development of the law, the weaknesses of the present system, which favor an easy return to the language of unlimited sovereignty, could be overcome.

It is crucial to such a theory for the development of international law that its corpus consists of a complete system of general principles which can be applied effectively by a judiciary to concrete situations. Hence the Court will not have to say that, with respect to the issue being adjudicated, states have not consented to the development of rules which limit their sovereignty in a particular matter, with the consequence that the Court has to declare that there is no law covering the dispute before it. Such an argument would carry with it the implication that one cannot look to courts to overcome the deficiencies in the corpus of rules of international law which are known to exist, so that there is no alternative to states meeting together as a quasi-legislature to formulate rules of general application to limit and guide their conduct. Kelsen does not see such meetings as a real political possibility, which is why he prefers the option of obligatory international adjudication. Hence he has to insist upon a strong role for the judiciary. He insists that the application of a general norm to a concrete case is by its very nature an individualization of the norm. That is to say, 'the existing rule is a framework of several different rules. By choosing one of them the law applying organ [the judiciary] excludes the others and thus creates, for the concrete case, a new law . . .'[31] The conclusion which Kelsen and the profession generally draw from this argument is that there is only a difference in degree and not in nature between the creation and application of law and that in this way the structural weakness of international law can be saved through the judiciary.[32]

The second part of Kelsen's argument was that the judgments of such a dynamic court had to be the starting point for the action of an international executive, such as the Security Council. Kelsen himself demonstrates that such is not what we have. Superficially, one might argue that the sovereignty of states is effectively limited by law

because the UN Charter is a treaty and under this treaty states are bound by decisions of the Security Council. However, the Charter does not tie the Council in any way either to decisions of the Court or even to a reference to international law. The former may decide upon the use of force wherever it considers a situation constitutes a threat to the peace under Article 39 of the Charter. It can also leave a decision of the Court unenforced. Nor is there anything to oblige the Council to consider any disputed question of fact in an impartial or quasi-judicial fashion. The Charter foresees what might be called a perfect independence of the Court and the Council, both principal organs of the UN.[33]

So, a state is prohibited by Article 2/4 of the Charter from having recourse to the use of force except when its territory is physically attacked. Thus the state is deprived of any effective mechanism for the adjudication and enforcement of its legal rights wherever it considers that there has been a violation. The outcome is that the Charter represents a deterioration in the quality of international law in comparison to the classical law. It excludes the individualized sanction for a violation of law by a state acting on its own, but does not replace it with an effective collective sanction. This means that in terms of the minimum conditions for the existence of law one cannot expect that international law will function.[34]

Therefore, it is to be expected that, in practice, states will not refrain from enforcing their rights individually whenever they consider them violated. Given that there is no compulsory international adjudication, should we be able to say that minimum conditions for an international legal order can exist where states act *as if* they are organs of the international community when they defend their rights. Kelsen recognized that it was the minimum condition for the existence of a legal order that it could characterize acts of violence as illegal or as sanctions against illegal behavior. International law does not have an objective instance (i.e. independent of states themselves) to distinguish between delicts and sanctions. Therefore, Kelsen would like to say, we have to suppose that each state decides itself if it estimates itself injured and if it will ensure that the injuring state incurs sanctions. Yet recently a major logical defect of Kelsen's system has been highlighted.

Nothing has been said, in the setting out of the logical conditions for a legal order, about the reasons a state has to give for considering itself injured. The feeble level of explication required of an individual state means that it is impossible for an observing third state to

distinguish the 'delinquent' from the 'sanctioner'. This is because it is not possible to follow a rule on one's own. The idea of a rule is that there is a common explication of the existence and content of the rule. Yet we do not have the adjudicative process which could guarantee this. Therefore, even from Kelsen's perspective, the minimum conditions for an international legal order do not exist.[35]

In other words, the radical subjectivization of international law, which Jouannet admits does come with Vattel's concept of sovereignty, with the introduction of sovereignty as a legal concept into international law, swallows up the legal character of this order. After considering this critique of international law, it remains to explore yet again Vattel's wider philosophical roots.

The Failure of Institutions and the Need for a Return to Philosophical Foundations

While the primary view of the original influences on Vattel is to attribute them to Locke, most recent scholarship in the history of political ideas traces the Western international law tradition most closely back to the Renaissance humanist tradition, in opposition to the medieval Scholastic tradition, which is eventually the same tradition from which Hobbes emerges. This is to insist at the same time on the falseness of a dichotomy between Locke and Hobbes, especially insofar as concerned Western relations with non-Western societies and peoples. The key element of this research, brought to the forefront by Richard Tuck, is precisely the element of subjectivity stressed within the mainstream international law canon by Brierly, albeit it is now rooted in a distinctive anthropology, which one might parody, following Tuck, as the 'Renaissance Man.'

So Tuck treats Hobbes as the most coherent representative of a tradition which encompasses all of the figures that concern us, and especially Vattel. The primary source of the conflicts of the state of nature is epistemic in character. It is not that persons are spontaneously aggressive. Rather, they are fundamentally self-protective and only secondly aggressive. It is the differing judgements which people make, which themselves arise from the fact that there is no objective standard of truth, which makes people aggressive, 'it is the fear of an attack by a possible enemy which leads us to perform a pre-emptive strike on him, and not, strictly speaking, the desire to destroy him . . .'[36]

The connection between epistemic moral skepticism and the conventional construction of meaning through the human construction

of the state is clear in the following passage from Hobbes' work *On the Citizen*, of which Lejbowicz speaks:

> This common measure, some say, is right reason: with whom I should consent, if there were any such thing to be found or known *in rerum natura*. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is nonexistent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power . . . and consequently the civil laws are to all subjects the measures of their actions, whereby to determine, whether they be right or wrong . . . [I]t shall not be decided by Aristotle, or the philosophers, whether the same be a man or no, but by the laws. (II.10.8)[37]

If one sees Hobbes as the culmination of a humanist tradition, in which Gentili is treated as a prime example, the understanding of 'humanist' may appear surprising. It refers to the Tacitist, reason-of-state tradition, with its implication that fear, whether objectively justified or not, was a legitimate basis for aggressive war. In other words, there could be no place for the Scholastic tradition of the distinction between just and unjust war. The idea of objective criteria for the justification of war was an illusion. This view was expounded first by Gentili, of whom Hobbes was perhaps an actual student (in the sense that he followed his lectures at Oxford). This is to distinguish the rhetorical and sophist humanist tradition beginning with Cicero, from the Aristotelian and Stoic tradition (Seneca), and to put it back in its context through the Renaissance of classical scholarship after the long medieval Christian practice of interpreting Cicero and others as only permitting war in defense of one's innocent and immediate safety.[38]

The anthropology underlying Hobbes's construction is that which is decisive, meaning, quite simply, his vision of man. The weakness of man's sociability is not simply rooted in fear. The fear itself has to be seen in the context of the fundamental desire of man not for friendship but for glory. In fact,

> every man would seek the company of other men whose society is more prestigious and useful to him than to others. By nature, then, we are not looking for friends but for honour or advantage from them . . . Even if this is sometimes harmless and inoffensive, it is still evident that what they primarily enjoy is their own glory and not society . . . Every voluntary encounter is a product either of mutual need or of the pursuit of glory . . .[39]

This anthropology explains both the roots of subjectivity and the inevitability of violent conflict.

However, there is an added dimension to Hobbes's work which needs to be made explicit and which is crucial to providing it with its epistemic foundation. The added distinction is crucial because the European tradition which Hobbes was negating, and Gentili as well, was the Scholastic tradition based upon Aristotelian–Thomist philosophy. The epistemic center as the modern state was not, maybe, an exclusively Protestant phenomenon, but it was, as already suggested, an outcome of the Reformation and a break with the medieval tradition.

Hobbes was the most explicit exponent of the thesis that the state had to be *omnipotent* in the making of laws and the final arbiter of any dispute where, *ex hypothesi*, there was no agreement as to how a supposed norm was to apply.[40] The decisive aspect of this exercise of authority is the absorption of all symbols of legality into the state, which includes the unification of the religious and the political. Why Hobbes felt compelled towards this course he makes plain when he says in Part III of *Leviathan* (*Of A Christian Commonwealth*) that the reason for the right of the sovereign to appoint pastors is that the right of judging what doctrines are fit for peace and to be taught to subjects must rest in the sovereign civil power, whether it be one man or an assembly of men. The reason is obvious: 'that men's actions are derived from the opinions they have of the Good, or Evil.'[41]

What may not be fully clear even from these words is the sacralization of the state which Hobbes deliberately intends. The sovereign must have supreme power in all ecclesiastical matters, where the sovereign is a monarch or an assembly 'for they that are the Representatives of a Christian People, are Representatives of the Church: for a Church, and a Commonwealth of Christian People, are the same thing. . .' (p. 576). When Hobbes begins his extensive controversy with the Roman Catholic Prelate Bellarmine, he declares: 'I have already sufficiently proved that all Governments which men are bound to obey, are simple and Absolute . . .' Whether the authority is democratic, aristocratic, or monarchic does not matter. The essential point is the power it has to be 'an Absolute Sovereignty' (576–7). A crucial feature of the medieval so-called philosophical tradition would be the presence of numerous persons with different interpretations of 'reason.' Hobbes says that all laws have need of interpretation. Therefore, the idea of law must be subordinated to the question of who interprets it. The answer is that the law is binding because it is 'the Sovereign's sentence' (322–3). There is no place for an independent learned class, making doctrines which depend on

their learning and not upon the legislative Power (368). In the reading of books, one imagines the exploits of the Greeks and the Romans in overthrowing tyrants, where words such as regicide and tyrannicide are used. People imagine that if they use the right words they can lawfully rebel (369). Again, Hobbes is determined on the sacralization of state power. The Doctors claim to set up a ghostly authority against a civil 'working on men's minds, with words and distinctions, that of themselves signifie nothing, but bewray (by their obscurity) that there walketh (as some think invisibly) another Kingdome, as it were a Kingdom of Fayries, in the dark . . .' (370). In his discussion of the supposed distinction between temporal and spiritual he sees only anarchy. 'For seeing the Ghostly Power challengeth the Right to declare what is Sinne it challengeth by consequence to declare what is Law, (Sinne being nothing but the transgressor of the Law;)' (371).

Yet the image of the divinity of the state leaves the European international law tradition with a concept of the state which is incompatible with any overarching binding notion of law. Hobbes explains why the commonwealth cannot be subject to the civil law (that is to say, what the commonwealth has already commanded). The religious tone of the following expression is clear, remembering that Hobbes has already equated the religious and political commonwealths. This can be seen in the reference to binding and loosening, an analogy with the scriptural authority for ecclesiastical authority and papal infallibility:

> The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not subject to the Civil Lawes. For having power to make and repeal lawes, he may when he pleaseth, free himself from that subjection, by repealing those Lawes that trouble him . . . Nor is it possible for any person to be bound to himself; because he that can bind, can release . . . (chapter 26, 313)

Locke and Vattel are equally committed to this epistemology of the state as the source of meaning. However, the specific contribution of the international law tradition, from Grotius to Vattel, is to add the racial element, that the Law of Nature had the specific quality to authorize special action by the Europeans against its breaches by non-European peoples. Particularly in the context of European relations with non-European peoples, Locke insisted upon a continuance of a natural right to punish, precisely because the laws of Europeans, the states of England, France, and Holland, do not extend to the Indians who do not recognize them. Without recourse to natural law the safety and property of humankind could not be preserved, where the so-called Indians are violating the Laws of Nature, particularly with respect to

property and commerce.[42] In this Locke followed the humanist tradition, as distinct from the Scholastic tradition, giving little place to a natural law of sociability.[43] In this Locke was also following on from Grotius, who Rousseau rightly complained could not be distinguished from Hobbes.[44] Locke's theory of punishment was identical to Grotius's and is a remarkable example of intellectual convergence.[45]

Essentially, Locke followed Grotius's situating of himself on the side of Gentile against the Scholastics in the following substantive respects. The *Second Treatise*, according to Tuck, offers a political theory which 'vindicates a private right of punishment against peoples or nations which break the law of nature . . . and which allows settlers to occupy the lands of native peoples without consulting their wishes in any way . . .'[46] Grotius, in his turn, concludes Tuck, far from being the heir of Vitoria and Suárez, followed the humanist tradition which they distrusted, and as a consequence, 'Grotius endorsed for a state the most far-reaching set of rights to make war . . . [and] he accepted a strong version of the international right to punish, and to appropriate territory which was not being properly used by indigenous peoples. . .'[47]

So the concepts of sociability and humanity to which Vattel could claim inheritance were already very thin. Vattel did distinguish himself from Grotius on the key element of the right to punish, which he shrewdly observed left the door open to a wide variety of fanatical enterprises which would bear comparison with the escapades of Mohammed.[48] However, it would still be difficult to distinguish this restraint from the license which Vattel gave for the powers to wage preemptive war against an apparently growing hegemony. 'For if there be found a restless and unprincipled Nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all the others would have the right to unite together to subdue such a Nation, to discipline it, and even to disable it from doing further harm . . .'[49] Besides, if a Prince violates the fundamental law in relation to his people, giving them a lawful case to resist then it is permissible to assist such a brave people.[50] Finally, Vattel was insistent on the right of Europeans to colonize North America, which the 'savage' tribes had no right to keep to themselves.[51]

Tuck concludes that Vattel's *Law of Nations* was a

> more or less faithful version of the Grotian argument, as developed by Locke . . . Liberal politics, of the kind that both Locke and Vattel amply subscribed to, went along in their work with a willingness to envisage international adventurism and exploitation, and this was no accident: for

> the model of the independent moral agent upon which their liberalism was based was precisely the belligerent post-Renaissance state. . . . There is a kind of violence within liberalism of the Lockean type which goes back to its origins in the violent politics of the Renaissance, in which liberty and warfare (both civil war and international conflict) were bound together . . .[52]

In my opinion this inspired judgement exactly encapsulates the broader historical context of the violence which specifically the liberal democratic, market economy states inflict upon the parts of the world that were colonized and are now so-called Third World. Doctrines of pre-emptive attack have to be understood specifically within the social constitutions from which they come, but the focus and direction of their violence has always been directed outwards towards the south. None of this is to attribute higher moral worth to the southern regions of the world. This study does not attempt to say anything about them. Yet there remains a bitter twist in the tail of the argument that democracies do not fight one another. They direct their negative energies outwards. The following Appendix illustrates how this phenomenon is integrally embedded in the basic ideas of a Western country concerning the nature of international customary law and its development in relation to the law relating to the use of force.

APPENDIX: THE IRAQ WAR AS A CONTINUING ACTUALITY OF THE IMPLICIT COLONIALISM AND RACISM OF THE PARADIGM OF A LIBERAL-HUMANIST INTERNATIONAL ORDER

There is a serious need to place British, and of course US, state practice, as represented by the invasion of Iraq, in the wider context of the history and present character of the British state. To do this it is necessary to do a lot more than consider the legal advice tendered, whether by the Attorney General or by Foreign Office lawyers, offering to justify the war. The arguments used by leading British politicians, especially Tony Blair, to convince Parliament and obtain consent for the invasion are more central to the creation of a British *opinio juris* concerning the material element of state practice, i.e. the actual invasion. This is because official, even legally formulated positions are not as decisive in constituting the *action of a state* as the arguments used by political elites to drive the institutions of the state into motion. It is in this wider context that one can expose and draw out the underlying anthropology that is driving the state. Perhaps the *New Statesman*'s political editor, John Kampfner, affords the most authoritative survey

of the development of elite political thinking, based on selected interviews, from Tony Blair's commitment to George W. Bush to go to war on April 6, 2002 at Crawford, Texas, until the actual outbreak of war.[53] The NGO activist and former Chatham House (RIAA) Research Fellow Mark Curtis, in his turn, affords a key officially documented review of the place of the invasion from within the history of British institutional practice, particularly in terms of the rather overlooked review which the British state is itself making of the invasion.[54] However, for both the international lawyer and the philosophical anthropologist, really central is the British civil servant (now European) and former Blair policy advisor, Robert Cooper's study [55] to gain an understanding of just how deliberate and systematic is the present British government's rejection of the international law of the UN Charter on the use of force. As a key advisor to Blair, who articulates the government's thinking, Cooper reveals how there is now a commitment to a doctrine of preventive attack, or pre-emption. What it is crucial to understand about this doctrine is how it conceives the threat that Britain is supposed to face in terms of an enemy which has rather familiar overtones from Britain's colonial heritage.

Official accounts of the legal justification for the invasion of Iraq are very well rehearsed. They concern supposed material violations by Iraq of its disarmament obligations under Security Council Resolutions. These violations were supposed to lead to a revival of the force of SCR 678, on the right to use all necessary means to restore peace and security in the area. So SCR 687 merely setting out the ceasefire conditions only suspended SCR 678. A proposal that the famous 2002 SCR 1441 should contain a requirement for a further decision by the Council before 'action was taken' was not adopted.[56]

However, these opinions came at the very end of a process, in the weeks of March 2003. It is much more illuminating to explore the nature and style of the argument and charge that Iraq had not complied with its disarmament obligations. The entire weight of British government strategy, to obtain the consent of Parliament and the acquiescence of public opinion to the invasion, was directed to the nature and conduct of Saddam Hussein's government with respect to weapons of mass destruction (WMD). This is the crucial area of activity to explore. The British government believed that the way to justify war was to show that there was a serious threat coming from the Iraqi regime.

The arguments about whether there were WMD in Iraq are known to be slippery. It is, however, widely accepted, after the Butler Report,[57] that the British government put a weight on

available intelligence that it could not bear. This can be understood to be deception. However, that is not a central matter for the present argument. Rather more important is to follow closely the types of formulations of the 'threat from Saddam Hussein' that had to be met. It is in fact the nature of their definition of this threat that gives the first indication that the British government is operating within a framework of preventive or pre-emptive attack, a fact that will be seen even more clearly in official pronouncements after the invasion.

The context for the definition of the threat was provided by Saddam Hussein's 'non-compliance' with paragraphs 3 and 4 of SCR 1441. He had to produce tangible evidence of his actual programs to develop chemical, biological, and nuclear weapons. 'Non-compliance' meant false statements or omissions in the declarations Iraq made pursuant to the SCR. It is in such a context that Kampfner pinpoints the technical aspect of the danger Iraq is supposed to represent. The British government intelligence dossier (of September 2002) contains, in part 1, of chapter 3, a statement that Iraq retained some chemical warfare stocks which would enable it to produce significant quantities od chemical weapons within weeks. Intelligence about chemical and biological warfare facilities pointed to a continuing research program. Kampfner comments: 'These observations were hard to prove or disprove. The language was carefully crafted, combining hypothesis and assumption with alarm . . .' (205).

It is against this carefully sustained ambiguity of the intelligence base that Kampfner summarized how Blair frequently appeared to say, for instance in the autumn of 2001, that 'the world would face a threat of an altogether different scale if Saddam made his chemical and biological weapons available to terrorists groups . . .,' an analysis that Kampfner describes as an hypothesis based upon an assumption (157). In September 2002, Blair was saying, of the history of Saddam and WMD, that the present threat is real and the UN has to be a way of dealing with it, not a way of avoiding dealing with it (Kampfner, 196). Yet later in the same month Blair said to journalists, 'I am not saying it will happen next month or even next year, but at some point the danger will explode . . .' (Kampfner, 198). The final speeches to the House of Commons were equally vague. On February 5, 2003, Blair said, 'It would be wrong to say there is no evidence of any links between al-Qaeda and the Iraqi regime. There is evidence of such links. Exactly how far they go is uncertain . . .' (Curtis, 63).

Immediately the invasion began, on March 20, 2003, Blair announced in a television broadcast, that the goal was to remove

Saddam Hussein from power and disarm Iraq of WMD. In other words, comments Curtis, the only way to disarm Iraq is to change the regime (Curtis, 38). While beforehand regime change was recognized not to be in itself a legally permissible objective, now it could be stated openly. It was the regime itself that was the object of the invasion. In June 2003 the Foreign Secretary, Jack Straw, said that neither he nor Blair had ever used the words 'immediate' or 'immanent' to describe the threat Iraq posed. Instead, they spoke of a current and serious threat (Curtis, 54).

In July 2003 the government made a response to the House of Commons Defence Committee which treated international law as no absolute: 'We will always act in accordance with legal obligations, but also effectively to defend the United Kingdom's people and interest and secure international peace and stability' (Curtis, 39).

Then, in March 2004, Blair explicitly set out a full-blown doctrine of pre-emption. The key stage in expanding upon and articulating a doctrine of pre-emption or preventive war, Curtis notes, comes with Blair's speech of March 5, 2004 (Curtis, 40). Blair is responding once again to the controversy surrounding the invasion and endeavoring to put it in a wider context. He questions the UN Charter's limit on armed intervention to self-defense in the face of armed aggression.

> Containment will not work in the face of the global threat that confronts us. The terrorists have no intention of being contained. The states that proliferate or acquire WMD illegally are doing so precisely to avoid containment. Emphatically I am not saying that every situation leads to military action. But we surely have a duty and a right to prevent the threat materialising; and we surely have a responsibility to act when a nation's people are subjected to a regime such as Saddam's . . .[58]

Curtis highlights how the scene is further developed in the Ministry of Defence White Paper of December 2003, *Delivering Security in a Changing World*.[59] Curtis places this document in the context of previous Ministry documents, going back to the Strategic Defence Review of 1998, which said that 'in the post-cold war world we must be prepared to go to the crisis rather than have the crisis come to us' (Curtis, 74). Among the development highlighted in various official papers, that from *Operations in Iraq: Lessons for the Future* is interesting in placing the invasion in an embedded context of British politico-military strategy rather than in some inexplicable submission to US demands: 'The operation in Iraq demonstrated the extent to

which the UK armed forces have evolved successfully to deliver the expeditionary capabilities envisaged in the 1998 Strategic Defence Review and the 2002 New Chapter . . .'[60] Curtis elaborates that the December 2003 White Paper takes this argument further. One must now envisage crises across sub-Saharan Africa and arising from the wider threat from international terrorism (Curtis, 76).

It is quite clear that the threat and use of force are becoming once again an integral part of UK national policy. The Secretary of Defence, Geoff Hoon, writes in his Foreword: 'it is now evident that the successful management of international security problems will require ever more integrated planning of military, diplomatic and economic instruments at both national and international levels . . .' [61] In the same vein the document declares that 'effects-based operations' mean that 'military force exists to serve political and strategic ends. . .Our conventional military superiority now allows us more choice in how we deliver the effect we wish to achieve . . .'[62]

Curtis quotes these phrases in order to translate them as: 'we will increasingly threaten those who do not do what we say with the prospect of military force' (Curtis, 77). That is the light in which one has to understand the passage in Blair's speech of April 5, 2004, where he remarks of those who oppose his policies: 'When they talk, as they do now, of diplomacy coming back into fashion in respect of Iran or North Korea or Libya, do they seriously think that diplomacy alone has brought about this change?'[63]

The major intellectual support for the policies described through interviews by Kampfner and through official documents by Curtis, comes from Robert Cooper, who set out his views in his now infamous *Observer* article of April 7, 2002 '*Why We Still Need Empires*', one day after Blair's commitment to Bush at Crawford, Texas, to invade Iraq (Kampfner, 152). His central point is that 'outside the post-modern continent of Europe, we need to revert to the rougher methods of an earlier era – force, pre-emptive attack, deception . . .'[64] Cooper is a diplomat reputed to offer a 'theoretical framework' for Blair's foreign military-security policy. It is clearly and repeatedly reflected in the Defence White Paper and in Blair's speech of March 5, 2004. Cooper's significance is enhanced by the press accolades which accompany the publication of his book, describing him as 'a senior British diplomat who has gone from being one of Tony Blair's closest foreign policy advisers to serving under Javier Solana, the European Union's new putative foreign minister.' The authoritative contemporary Cambridge historian Brendan Simms writes, 'Robert Cooper is

widely believed to provide the intellectual superstructure for what the prime minister thinks, but is as yet unwilling to articulate publicly . . .'[65]

In *The Breaking of Nations* Cooper has offered a precise paradigm for intervention by a developed country in the internal affairs of a developing country on humanitarian grounds. Humanity must be firmly linked with the needs of security, which Cooper understands ultimately in the postmodern terms of the undisturbed quality of the private lives of individuals pursuing their own development. He recognizes that international law exists, but needless to say, it is out of date, belonging to a time when the modern reigned supreme, thanks mainly to the vigor of Western colonial empires.

Cooper denies the very universality of international society and divides it into three parts: the pre-modern, the modern, and the postmodern. The pre-modern world covers an expanding area where the state has lost the monopoly of the legitimate use of force. In language which shows how a surprisingly colonial European international law tradition belongs to present-day Europeans, Cooper writes:

> we have, for the first time since the 19th Century, a *terra nullius* . . . And where the state is too weak to be dangerous, non-state actors may become too strong. If they become too dangerous for established states to tolerate, it is possible to imagine a defensive imperialism. If non-state actors, notably drug, crime or terrorist syndicates, take to using non-state (that is pre-modern) bases for attacks on the more orderly parts of the world, then the organized states will eventually have to respond. This is what we have seen in Colombia, in Afghanistan and in part in Israel's forays into the Occupied Territories . . . (Cooper, 17–18)

The pre-modern refers to the failed state, to the pre-modern, post-imperial chaos of Somalia, Afghanistan, and Liberia. The state no longer fulfills Weber's criterion of having a legitimate monopoly on the use of force. Cooper (66–9) elaborates upon this with respect to Sierra Leone. This country's collapse teaches three lessons: chaos spreads (here to Liberia, as the chaos in Rwanda spread to the Congo); second, as the state collapses crime takes over, and as the law loses force privatized violence comes in. It then spreads to the West, where the profits are to be made. The third lesson is that chaos as such will spread, so that it cannot go unwatched in critical parts of the world. An aspect of this crisis is that the state structures themselves, which are the basis of the UN language of law, are a last imperial imposition of the process of decolonization.

So Cooper formulates a general principle for dealings with non-Western states which is incompatible with the international law of the Charter. It is based upon an openly imperialist anthropology that, not surprisingly, he sees to be as much a part of European as of American elite mentalities. In Blair's case, Kampfner supports this point. He insists that Blair regards as a major foreign policy priority 'Our history is our strength,' that we have to draw on Britain's influence as a former colonial power. 'Our empire left much affection as well as deep problems to be overcome' (236). The danger of the so-called pre-modern is that, while 'We' (postmodern Europeans) may not be interested in chaos, chaos is interested in us. The rhetoric is blistering, reminiscent of the 'yellow peril' or 'the dark heart of Africa':

> In fact chaos, or the crime that lives within it, needs the civilised world and preys upon it. Open societies make this easy. At its worst, in the form of terrorism, chaos can become a serious threat to the whole international order. Terrorism represents the privatisation of war, the pre-modern with teeth; if terrorists use biological or nuclear weapons the effects could be devastating. This is the non-state attacking the state. A lesser danger is the risk of being sucked into the pre-modern for reasons of conscience and then being unwilling either to take over or to get out. . . (77)

While European international lawyers inhabit a postmodern world (of which more later) Europe itself is a zone of security beyond which there are zones of chaos which it cannot ignore. While the imperial urge may be dead, some form of defensive imperialism is inevitable. All that the UN is made to do is to throw its overwhelming power on the side of a state that is the victim of aggression (58). So, as presently constituted, it cannot provide a guide for action. Nonetheless, Cooper generally counsels against foreign forays. For Europeans to practice humanitarian intervention abroad is to intervene in another continent with another history and to invite a greater risk of humanitarian catastrophe (61). However, the three lessons of recent state collapse in Sierra Leone, etc., cannot be ignored. Empire does not work in the post-imperial age (i.e. acquisition of territory and population). Voluntary imperialism, a UN trusteeship, may give the people of a failed state a breathing space and it is the only legitimate form possible, but the coherence and persistence of purpose to achieve this will usually be absent. There is also no clear way of resolving the humanitarian aim of intervening to save lives and the imperial aim of establishing the control necessary to do this (65–75). While Cooper concludes by saying that goals should be expressed in relatives rather

than absolutes, his argument has really been that the pre-modern, the modern, and the postmodern give us incommensurate orders of international society. This is the context of our dilemmas concerning interventions in the chaotic pre-modernity of non-Western parts of international society. Cooper's incommensurability is infused with the anthropological heritage of colonialism.

The UN is an expression of the modern, while failed states come largely within the ambit of the pre-modern. Cooper means, practically, that the language of the modern UN does not apply to pre-modern states. This is not to say the Charter is violated in that context. It is simply conceptually inapplicable (16–37). The modernity of the UN is that it rests upon state sovereignty and that in turn rests upon the separation of domestic and foreign affairs (22–6). Cooper's words are that this is still a world in which the ultimate guarantor of security is force. This is as true for realist conceptions of international society, as governed by clashes of interest, as it is of idealist theories that the anarchy of states can be replaced by the hegemony of a world government or a collective security system. I quote: 'The UN Charter emphasizes state sovereignty on the one hand and aims to maintain order by force' (23).

Even in the world of the modern the typical threats to security render the Charter rules on the use of force redundant. The modern also presents nightmares for which classical international law is not prepared. The sovereign equality of states means that, where all could possess nuclear and other WMD, one faces nuclear anarchy, with all states capable of destroying one another (Cooper, 63). Preventing this nightmare of the modern 'should be a priority for all who wish to live in a reasonably orderly world' (64). And so international law is obsolete. 'Following well-established legal norms and relying on self-defence will not solve the problem. Not only is self-defence too late after a nuclear attack, but it misses a wider point . . .' (64). Weapons affect those not directly involved. The more countries which have them the more likely it is they will be used. The more they are used the more they will be used. And so on! This means: 'It would be irresponsible to do nothing when even one further country acquires nuclear capability. . . Nor is it good enough to wait until that country acquires the bomb. By then the costs of military action will be too high . . .' (64).

So the doctrine of preventive action in US National Security Strategy is not so different from the traditional British doctrine of the balance of power. For instance, the War of the Spanish Succession was a war to prevent the Crowns of France and Spain coming together.

No one attacked Britain, but if it had waited for the two Crowns to form a new superpower, it would have been unable to deal with a resulting attack.

Not content to denounce international law doctrine on the use of force, Cooper strikes at the heart of the rule of law, as a standard of formal equality, by saying:

> if everyone adopted a preventive doctrine the world would degenerate into chaos . . . A system in which preventive action is required will be stable only under the condition that it is dominated by a single power or concert of powers. The doctrine of prevention therefore needs to be complemented by a doctrine of enduring strategic superiority – and that is, in fact the main theme of the US National Security Strategy . . . (64–5)

This is not to treat American dominance as an optimal ideal. The US is, in any case, not fully effective in the Middle East and quite absent in Africa (Cooper, 81–5). There must be a virtual monopoly of force. At present it is with the US and clearly the US will exercise it in its own interests. This is not legitimate. The power should rest with the UN, whose many failures show it cannot easily lose legitimacy (167). The question is how to get there, and anyway the new UN would have to be prepared to engage regularly in preventive wars, in order to spread democracies and the liberal state, the only form of government which can make the world secure (167, 177).

The rest of Cooper's argument explores Europe's postmodern ease. Its motivating force is the primacy of the individual over the collective, the private over the public, and the domestic over the foreign. This expresses itself in post-national cooperativeness, transparency (especially in security and military matters), and the priority of the individual's personal development needs over the chimera of the power and prestige of the state. This European quality of life rests upon the US security umbrella, as does a similar life style in Japan and in much of the American continent (161).

All of this hugely confines the prospects for significant European 'humanitarian' interventions, i.e. ones driven, in any case, primarily by the need to secure the quality of European lifestyles. One possibility may be for the postmodern cooperative Empire of Europe to extend itself ever wider (Cooper, 78). However, the attractiveness of postmodern Empire as a dream may never happen and, until it does, 'the post-modern space needs to be able to protect itself. States reared on *raison d'état* and power politics make uncomfortable neighbors for the post-modern democratic conscience . . .' (79).

Will Europe respond to such a traditional challenge? Cooper thinks not. The European postmodern mood has gone too far. Cooper quotes the horrid Nietzsche, himself a painful memory of the early twentieth century, in *On the Genealogy of Morals:* 'How much blood and horror lies at the basis of 'all good things'. Justice arises not from the desire of the weak for protection but from the tragic experience of the strong. From the traumas of the twentieth century Europe has lost the will to power, while from the trauma of September 11, the US rediscovered it (164–5).

Curtis's general argument is, effectively, that Blair's government is not Bush's poodle, precisely because it is continuing an imperial policy largely uninterrupted even by the Suez Crisis. It may have become more or less covert after 1956, but he might say that, in a political culture as immature as Britain's, there is really no need for the Blair government to conceal its policies. No matter how loudly it shouts them out, there are very few who will be listening and who will understand. Certainly international lawyers appear to take the government's 'legal arguments' at face value, without regarding the government's actual practice. That is what makes Cooper's revival of an explicit imperial culture so promising. Blair and his colleagues, at the least, have heard Nietzsche's call, whether tragic or tragic comic.

Conclusion

The purpose of this chapter has been to demonstrate that the principles, rules, and institutions of what is supposed to be positive international law are rooted in a thoroughly perverse anthropology which makes violence, and particularly racial violence, inevitable at the inter-state level in international society. It is only by unraveling from its very origins the poison of liberal humanitarianism that it will be possible to imagine a concept of humanity in international society that can rest upon a possibility of mutual sympathy, respect, understanding, and solidarity.

Notes

1 Brierly, *The Law of Nations* (1963) 39–40.
2 Ibid., 40.
3 Ibid., 38.
4 Ibid.
5 Ibid., 39.

6 I., Kant, *Perpetual Peace and Other Essays on Politics, History and Morals*, trans. and ed. T. Humphrey (1982) 355.
7 J. Bartelson, *A Genealogy of Sovereignty* (1995) 194–5.
8 *International Law* vol. 1 (1992/6) 135–6.
9 E. Jouannet, *L'Emergence: Part II Autonomisation du droit des gens* (1993) esp. 141–7.
10 Ibid., 300–24.
11 Ibid., 354–88, esp. 384 ff.
12 Bartelson, *A Genealogy of Sovereignty*, esp. 137–85, a summary of chapter 5, 'How policy became foreign.'
13 Ibid., 194–5.
14 Jouannet, *Autonomisation*, 447.
15 Ibid., 448.
16 Ibid., 451.
17 Ibid., 454–8.
18 Ibid., 458–9.
19 Ibid., 472.
20 B. Stoitzner, 'Die Lehre vom Stufenbau der Rechtsordnung,' in S. Paulson and, B. Walter, *Untersuchungen zur Reinen Rechtslehre* (1986), 50 at 76; also T. Ohlinger, *Der Völkerrechtliche Vertrag* (1975).
21 H. Kelsen, *Der soziologische und der juristische Staatsbegriff* (1928) 137.
22 Ibid., 138–9.
23 Ibid., 82–3.
24 Ibid., 86.
25 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920/8), 230–1, 239–41.
26 Ibid., 239–41, 249–52, 274.
27 Ibid., 261.
28 Ibid., 264.
29 Ibid., 265.
30 Ibid., 266.
31 H. Kelsen, *Collective Security under International Law* (1954) 18.
32 C. Tournaye, *Kelsen et la securité collective* (1995) 43–4, citing Kelsen and refering to other literature.
33 Ibid., 63.
34 Ibid., 70, 77.
35 O. Pfersmann, 'De la justice constitutionnelle à la justice internationale: Hans Kelsen et la seconde guerre mondiale,' *Revue française de droit constitutionnel* 16 (1993) 761 at 788–9.
36 Richard Tuck, *The Rights of War and Peace, Political Thought and The International Order from Grotius to Kant* (1999) 130.
37 Cited in Ibid., 131–2.
38 Ibid., esp. 138–9 and the whole of chapter 1 of *Humanism*, and esp. 22 ff.; and 126 for the possibility that Hobbes heard Gentili's lectures.

The connections between Hobbes and the international law tradition represented by Gentili form the heart of Tuck's book.

39 A quotation from Hobbes, *On the Citizen*, I, 2 by Tuck, at 134.
40 This follows an argument already presented in Anthony Carty '*English Constitutional Law from a Postmodernist Perspective*,' in *Dangerous Supplements*, ed. Peter Fitzpatrick (1991) 182–206.
41 Thomas Hobbes, *Leviathan*, ed. C. B. McPherson (1968), chapter 42, 567.
42 Tuck, *The Rights of War and Peace*, 170–1, quoting Locke's *Second Treatise of Government*, paras 7 and 9.
43 Ibid., 180.
44 Ibid., 94–102, esp. 102.
45 Ibid., 171.
46 Ibid., 177.
47 Ibid., 108.
48 *The Law of Nations*, vol. II, 1, 7.
49 Ibid., vol. II, 4, 53.
50 Ibid., vol. II, 3, 56.
51 Ibid., vol. II, 7, 97.
52 Tuck, *The Rights of War and Peace*, 195–6.
53 John Kampfner, *Blair's War* (2004) 152.
54 Mark Curtis, *Unpeople, Britain's Secret Human Rights Abuses* (2004).
55 Robert Cooper, *The Breaking of Nations* (2004).
56 *International and Comparative Law Quarterly* 52 (2003) 811 ff. The Attorney General's Answer and a Foreign and Commonwealth Office Paper.
57 *Review of Intelligence of Weapons of Mass Destruction*, HC 898, July 2004.
58 www.pm.gov.uk/output/Page5461.asp March 5, 2004, Prime Minister warns of continuing terror threat. This very substantial speech shows the influence of Cooper in the comprehensiveness with which it rewrites the agenda of international law, and will be considered later.
59 www.mod.uk.
60 www.mod.uk. Chapter 3, 'Lessons From The Operation: Key Lessons,' no. 1, quoted in Curtis, 76.
61 www.mod.uk. White Paper, p. 1.
62 Ibid., chapter 4, p. 10.
63 www.pm.gov.uk/output/Page5461.asp.
64 www.observer.guardian.co.iuk/worldview/story/0,11581,680117,00.html.
65 *Breaking of Nations*, inside cover pages for both quotations.

5

AMERICAN LEGAL CULTURES OF COLLECTIVE SECURITY

Introduction

I wish to present a perspective from American culture and history, which may help to explain dominant American tendencies to resort to the unilateral use of force to resolve what Americans take to be demands of their national security. This is very far from wishing to deny the importance of international law, either as an intellectual construct or as an ideological weapon. Indeed, the wider cultural, historical analysis is intended to demonstrate the contrary. International law language is the final battleground in the struggle for legitimacy, which always accompanies the use of force. Nonetheless, international law is plagued by the problem of auto-determination of its normative system, by the absence of a framework of compulsory adjudication of disputes. This fact ought to lead international law theorists to attach exemplary importance to the character of international legal personality. If, indeed, it is a feature of the legal personality of states that they have sovereignty, why is it that international lawyers treat this fact as purely formal? Does state independence from authoritative external criticism not have itself a substantive aspect, a cultural, symbolic dimension that the history of the discipline can more fully elucidate?

As has been seen, modern international law theory does not directly broach the issue of international legal personality, except formally to delimit their legal powers through an international legal order. This is surprising because it is obvious that where the interpretation of norms depends entirely upon the independent exercise of judgment by the subjects of a legal order, attention should be paid to the character of these subjects. However, postmodern international relations theory has a full-blown theory of the *construction of the collective subject* represented by the state (or nation-state) as part of a system of states, i.e. *with a focus on the need to explain how such identity or subject is constructed in relation*. This explanation is material, concerned with the domestic content of statehood, precisely while insisting that the

domestic and the foreign are mutually constitutive. Indeed, these theoretical developments have been worked out most fully by scholars working on the place of the present US in the international system. The implications of the construction of the *domestic/foreign dichotomy* are to destabilize international or systemic normativity at the same time as constituting it.

The key postmodern international relations text is David Campbell's *Writing Security, United States Foreign Policy and the Politics of Identity*,[1] in which several key features of collective identity are elaborated. One is to explain it as a vacuum that has to be filled through a negative construction of the 'other,' which returns to give it material content. This process is a deeper level of the process of secularization represented by Westphalia. Modern secularization, the core of which is self-assertion or self-determination, in rejecting medieval or universal Christendom, presented the problem of securing identity 'in terms of how to handle contingency and difference in a world without God.'[2] Absent the metaphysical guarantee of the world by God, man is faced with danger, ambiguity, and uncertainty, all in a world now unfinished. Relating the argument directly to Westphalia, Campbell explains how the transfer of sovereignty from God to the state meant also 'the transfer of the category of the unconditional friend/enemy relation onto conflicts between the national states that were in the process of integrating themselves.'[3]

The so-called legal sovereignty of states and the rule of law limiting force in international society suffer the colossal symbolic burden in the post-Westphalian era, that, in Campbell's words, in synthesizing contemporary postmodern scholarship, discourses of danger are always central to discourses of the state and of 'man,' where the demands for external guarantees inside a culture that has erased the ontological conditions for certainty mean that in place of spiritual certainty, the state has to find discourses of danger. These replace the Christian language of finitude, contempt of the world, and eternal salvation with that of a state project of security. The state engages in an evangelism of fear to ward off internal and external threats.[4] Campbell concludes this part of his argument:

> we can consider foreign policy as an integral part of the discourses of danger that serve to discipline the state. The state and the identity of 'man' located in the state, can therefore be regarded as the effects of discourses of danger that more often than not apply strategies of otherness. Foreign policy thus needs to be understood as giving rise to a boundary rather than acting as a bridge.[5]

A second part of Campbell's argument, intimately related to the first, is that ambiguity – read danger, uncertainty – is not disciplined by reference to a pregiven foundation. Campbell says: 'that "foundation" is constituted through the same process in which its name is invoked to discipline ambiguity.'[6] Just as the sources of the danger are not fixed, so the contours of the identity are constantly being rewritten, and it is only this process of repetitive inscribing which gives the permanence to what is by nature contingent and subject to flux.[7] The social totality is never really present, always containing traces of the outside within, and is never more than an effect of the practices by which total dangers are inscribed.[8] At the same time, sovereignty signifies 'a center of decision presiding over a self that is to be valued and demarcated from an external domain that cannot or will not be assimilated to the identity of the sovereign domain.'[9]

The two themes developed by Campbell – the construction of the self through the exclusion of the other, and the repetitive character of the techniques used to construct the self – will appear to be determining, compulsively, causally, or however, in American interpretation of use-of-force norms. However, before this stage of the argument is reached (i.e. before I offer interpretations of US international law arguments) I wish to draw on two further studies to illustrate exactly how US identity is constructed *in relation to use-of-force norms* and then how that identity is known, even to mainstream political historians, to be repetitively reconstructed at least in every generation.

The way to present this argument will be to consider briefly two studies taken to be representative of American thinking: Robert Jewett and John Shelton Lawrence, 'Captain America and the Crusade against Evil;'[10] and John Lewis Gaddis, *Surprise, Security and the American Experience*.[11] Both studies consider international law important and both claim that the fundamental cultural forces shaping American identity are equally shaping dominant approaches to international law. A greater part of Campbell's study also takes up the detail of American history to illustrate the same points with respect to America from the colonial period up to the early 1990s.[12] However, his story stops here and the advantage of the following studies is that they focus directly on the detail of the Bush Administration since 2001, while also providing an historical sweep.

The argument seeks to give more concrete shape to the distortions of the post-Westphalian order. If international law is taken to be either an objective order standing above states, according each their place, or a median reference point that states use to balance their relations

with one another, in either case the compulsion to define the self against the other will express itself, also, through *the inclusion of international law within the identity of the self, so that it merely serves as a boundary for the self and as a weapon against the other*.

Captain America and the Crusade against Evil: Religious Foundations of Contemporary American Foreign Policy

The special value of Jewett and Lawrence is that as a theologian and a philosopher they appeal directly to the specific intellectual context of the Bush presidency, its character as a so-called 'faith presidency.' The difficult part of their argument for a lawyer to follow is that they think, given the importance of the Protestant religions to dominant strands of American identity, the correction of mistaken theology is essential to the restoration of the place of international law in American cultural identity. However, it is no part of their argument that a 'true' international law has to find once again religious roots.

It is one of the strongest commonplaces of Western international law that, since Grotius and the Peace of Westphalia, international law is a secular branch of knowledge separate from the Christian Churches and able to unite peoples regardless of religious background. Jewett and Lawrence do not directly contest this. They are concerned to show how particularly Protestant misinterpretations of the Old Testament of the Christian Bible lead to a shortcircuiting of the idea of legal process and hence – and this is the center of their argument – of America's adherence to the international legal process. The authors still conceive international law in secular terms – above all, as a framework for the impartial adjudication of right, especially with respect to their factual foundations, on a basis of equality. However, the authors draw upon Daniel Moynihan's *On the Law of Nations*[13] for detail of the erosion of the US's commitment to international law, as a result of the stalemate of the Cold War (CACAE, 319). In other words, they consider the crisis of American adherence to international law goes back much further than the crisis of 9/11. They go to press in October 2002 and offer a grim history of US foreign policy.

Before exploring the detail of the authors' explanation of what they call the Deuteronomic subversion of international law, I propose to offer a justification of the focus on theology by pointing to a key study of Bush's religious beliefs that appeared just before the 2004 presidential elections. In the *New York Times Magazine*, an extensive article by Ron Suskind, entitled 'Without a Doubt'[14] is taken as demonstrating

plainly the central role of religion in Bush's entourage. The question is what kind of religion. Suskind describes the 'faith-based presidency' as 'a with-us-or-against-us model.' Suskind records a meeting for the introduction of Jim Towey as head of the President's faith-based and community initiative on February 1, 2002. Bush saw Jim Wallis, editor of the *Sojourners*, and came over to speak to him. Wallis commented on Bush's January 2002 State of the Union address (which included the *axis of evil* argument), where Bush had said that unless we devote all of our energy, etc., to the war against terror we are going to lose. Wallis added that if we don't devote our energy to the war on poverty, we will lose both the war on poverty *and* the war on terrorism. Bush, who said he had just been given Wallis's book *Faith Works* by his massage therapist, said that was why America needed the leadership of its clergy. Wallis responded, 'No, we need your leadership on this question . . . Unless we drain the swamp of injustice in which the mosquitoes of terrorism breed, we'll never defeat the threat of terrorism.' Wallis recalls that Bush looked at him quizzically and they never spoke again after that.[15]

Suskind has highlighted the 'there is no need of facts' element to the Bush presidency's decision-making as absolutely crucial. Many congressmen and cabinet ministers have found that when they pressed for explanations of the President's policies, which seemed to collide with accepted facts, the President would say 'that he relied on his *gut* or his *instinct* to guide the ship of state, and then he *prayed over it*.' Suskind explains more precisely what this means. He was once called in by a White House aide to hear critical feedback about an article he had written in *Esquire* about a former White House communications director, Karen Hughes. The following, in Suskind's view, goes to the heart of the Bush presidency:

> The aide said that guys like me were 'in what we call the reality-based community' which he defined as people who 'believe that solutions emerge from your judicious study of discernible reality.' I nodded and murmured something about enlightenment principles and empiricism. He cut me off. 'That's not the way the world really works anymore,' he continued. 'We're an empire now, and when we act, we create our own reality. And while you're studying that reality – judiciously, as you will – we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors and you, all of you, will be left to just study what we do . . .'

Suskind ends by calling again upon Wallis. Faith can cut in so many ways. If you are penitent and not triumphal it can move us to

penitence and accountability. But when it is designated to certify our righteousness, it is dangerous, pushing self-criticism aside. There is no reflection.

Jewett and Lawrence do still argue within a religious tradition, calling for a correction of it to achieve a restoration of the rule of law in international society. So it may be helpful to afford an, as it were, outsider's introduction to the contextual significance of their argument. They will claim that the 'faith-based' presidency, with the full connivance of the wider American public, absorbs the Judeo-Christian tradition into American identity in a blasphemous manner, rooted in what the authors call the Deuteronomic principle, arrogating to themselves the righteous identity of an infinite God rather than appreciating that a transcendent and accusing God independently challenges their own utterly finite, and repeatedly erroneous, moral choices. The essence of those choices is idolization of self, banishing fear and danger onto a demonized other. Simple regard to and perception of independent fact, the transcendence of the world beyond the self, are the first conditions of due process and the rule of law. They are eclipsed by what Jewett and Lawrence call a pop fascism, which absorbs all the elements of law into American identity. The central mistake concerns what the authors call the Deuteronomic dogma. Jewett and Lawrence ask that one try to interpret, for instance, the exultant American attitude after driving al-Qaeda and the Taliban from the cities of Afghanistan in the winter of 2001.

> To account for this phenomenon, we must trace the impact of the biblical models of the triumphant God and his victorious people as understood in the moral framework of right producing victory and wrong producing defeat. We need to explore the zealous interpretations of defeat and examine the psychic impact of unresolved defeat. (CACAE, 274–5)

The failure to understand the Vietnam defeat is central to understanding the present American crisis. The Nixon–Kissinger ambition to withdraw without appearing to be defeated was based upon the idolatrous Deuteronomic principle that victory for one side and defeat for the other clearly reveal God's justice and power. This

> places the honor of self or nation in the position of ultimate significance. Whenever this occurs a terrible distortion in perception follows. Having lost its due sense of finite worth, a nation embarks on campaigns to sustain its presumed infinite superiority, using means that are the very antithesis of

> the virtues it seeks to defend . . . It calls for a defense in every theater of competition. The sense of proportion disappears as the nation squanders its energies against specters on every hand. Every battlefield, no matter how dubious, is pronounced holy . . . (CACAE, 280)

The basic approach to the so-called 'war against terrorism' is marked by enthrallment to the Deuteronomic principle. The current interpretations of the crisis, which place blame firmly outside ourselves and repeat the naïve resolve never to make a mistake again like Vietnam, 'simply confirm in us the conviction that we are the innocent and the guilty should be bombed . . .' (CACAE, 289). To admit defeat, to 'disenthrall ourselves,' is the task before America's would-be Protestant leaders. The authors say, 'our culture's blindness to tragedy has been the superficial grasp of the theology of the cross by our dominant Protestant tradition . . . What American religious leaders need today is Paul's theology of the cross, with its grasp of human weakness . . .' (CACAE, 290).

The conclusion of this general part of the authors' analysis is that 'to admit defeat should be to acknowledge the transcendent justice of God. To admit defeat should mean to have discovered that the justice we sought to accomplish in Vietnam after 1954 and the current effort to rid the world of terrorism cannot be claimed as identical with divine justice – indeed, may have been repudiated by it . . .' (CACAE, 290).

The heart of Jewett and Lawrence's argument, to give it the necessary political weight and significance, is linking a distorted theology to popular culture, Captain America, the Lone Ranger, Superman, Rambo, etc. This has to be done to demonstrate in terms of cultural sociology the dominance of the Deuteronomic principle. The authors point to the enthusiasm of the US Ambassador to Germany in asking *Der Spiegel* for thirty-three poster-size copies of the cover of the magazine when it rendered Bush and his team as pop culture military heroes in February 2002 The President was flattered (CACAE, 40–3). It is necessary to single out the exact forms in which legal processes are shortcircuited as a matter of popular imagination. Hence the authors speak of pop fascism. The impatience with the UN and the Security Council have deep roots. The four tenets of American pop fascism are:

1. that superpower held in the hands of one person can achieve more than the workings of democratic institutions;
2. that democratic systems of law and order, of constitutional restraint, are fatally flawed when confronted with genuine evil;

3. that the community will never suffer from the depredations of such a super leader, whose servant-hood is allegedly selfless;
4. that the world as a whole requires the services of American super-heroism that destroys evildoers through selfless crusades. (CACAE, 42–3)

The iconic character of John Brown and *The Battle Hymn of the Republic* illustrate this. Jewett and Lawrence claim it comes directly from chapter 20 of the Book of Revelation, where the saints rule the earth after the destruction of the beast (CACAE, 63). The message of John Brown, as developed by H. D. Thoreau, was not to recognize unjust laws and that, in any case, he could not be tried by his peers because these did not exist. Instead, in Brown's own words, 'the crimes of this guilty land will never be purged away, but with blood' (CACAE, 172–3). The impatience with restraint shows itself after 9/11 with the warning of Senator John McCain that the terrorists must be disabused that America has not the stomach to wage a ruthless war, risking unintended damage to humanitarian and political interests (CACAE, 175).

Despite the argument that populist religion has widespread pull in American society, the authors are fully aware of the disciplinary dimension of identity formation. The struggle to exclude and demonize the other requires suppressions of the self, and a repressive construction of the self, if the latter is not to disintegrate into a seamless mass of boundaryless self and other. It is not only no accident but a permanent feature of the holy American wars that they are fought with a systematic deception not only of international opinion but also of American domestic opinion. This is not openly to facilitate manipulation of domestic opinion in a democracy, but also to preserve the image of crystalline purity of the super-hero warrior America.

There is no need of facts because, say the authors, 'the man who is privy to God's will cannot any longer brook argument, and when one declines the arbitrament of reason, even because one seems to have all reason and virtue on one's side, one is making ready for the arbitrament of blood' (CACAE, 187). At the same time wariness of overt anger and extremism means that the violence perpetrated has to remain largely hidden, even from oneself. The door is opened to impassive killings, for pure motives and without the need to regard consequences. The same artful zeal, in the hands of a Nixon–Kissinger-style team, can only be impervious to regret, since it is driven by desire for power, rather than any transcendent norm of

justice. Not restrained by public disapproval they can arrange the deaths of hundreds of thousands:

> Their protestations about innocent motives are sufficient to defend the most blatant misuse of power. Such individuals will despise constitutional precedents and make political use of the very religious leaders and traditions that could stand in judgment of them, as the equally artful Bill Clinton showed. The only things they fear are the cracks in the zealous façade. That they will consider journalists and congressional investigators as mortal enemies is logical . . . (CACAE, 188)

Jewett and Lawrence see a clear alternative in international law. The famous inscription from Isaiah at the United Nations envisages the nations bringing their disputes to it voluntarily, looking for impartiality. The idea of law is no respecter of persons (CACAE, 318). It clearly need not have a particular religious denominational foundation. However, the solution, which the authors propose, to restore the place of law in America's international relations, is probably foreclosed by the modernity that Campbell has described through the work of Blumenberg on the significance of Westphalia as a secularization process.

The problem, as Jewett and Lawrence see it, is the American mistake of stereotyping. This is a religious and not an intellectual problem. The stereotypes are of good and evil, 'beliefs that provide a clear and apparently defensible sense of the identity of and solution to evil and an equally clear and gratifying sense of national self-righteousness. To give them up is to acknowledge problematic aspects of one's national or peer-group history . . .' (CACAE, 237).

It is impossible to do justice to the richness of the authors' argument for law as the true foundation for world order. It involves a multifaceted journey through American obsessions with crusades, evil, conspiracies, redemptory violence, triumphalist resurrections, and, most of all, certainty about matters which, as Paul says, can only be seen through a glass darkly. However, perhaps the key element of their perspective is that Jesus was always anxious to ensure that his gatherings were not of like-minded persons. He always chose people who had acted out stereotyped roles that made co-existence impossible: tax collectors, prostitutes, despised outcasts, Roman collaborators (CACAE, 242). To complement this perspective, one needs to develop *institutions of co-existence*, structures of customs and law that allow competing groups to interact peaceably, by treating ideological opponents as equals (CACAE, 243). *Zealous nationalism* will

oppose this as it seeks to redeem the world by destroying enemies. However, the authors oppose to it *prophetic realism*, which 'avoids taking the stances of complete innocence and selflessness. It seeks to redeem the world for coexistence by impartial justice that claims no favored status for individual nations' (CACAE, 8).

So the idea of law itself must rest on a deeper metaphysic. The prophetic vision views humans as involved in a tangled web of their own sin, social alienation, in which the best they can hope to achieve is a modicum of justice by the grace of God (CACAE, 198). As for the events of history, victories, and defeats of nations, whether they 'may reveal the justice and power of God is a matter that may be glimpsed at times, but only *in a glass darkly*, with the eyes of faith' (CACAE, 280).

John Lewis Gaddis and the American Foreign Policy Tradition

It is possible to be more specific about the history of the doctrine of pre-emptive attack within a postmodern theoretical framework of identity. So far some explanation has been provided for the pre-emptive appropriation of the idea of international law into American identity so that it performs an essential part in defining the boundaries of American identity and threatens the integrity of its other. However, it is possible to go further. A second essential part of Campbell's argument was that the ontological lack in the identity that affirms itself in opposition is that it has to reaffirm the process of *self-constitution in opposition, through repetitive re-enactment of its foundations*. Gaddis provides just this interpretation of history, again within a critical perspective. He sees explicitly the implications for changing views of international law.

Gaddis warns against the potential self-destructiveness of a process that he describes in the secular Greek term hubris, rather than the Judeo-Christian terms of demonic or blasphemous spiritual pride. It is a form of madness to equate one's own security with that of the whole planet. Yet it has been the case in decisive moments of American history, since the very beginning of the Republic, to pre-empt danger through an expansion that is, in the final analysis, unilateral and hegemonic. The central part of Gaddis's argument is that, in moments of crisis, America will inevitably, given the pull of an already constituted identity, repeat its most practiced responses automatically. The post-9/11 era is such a moment. Gaddis himself concludes on a critical note that the only way out of the madness of

hubris is to come to see oneself as others see one. Yet that necessitates a very dynamic and pressing insistence on consensus by its erstwhile Allies. Meanwhile a new doctrine of pre-emption will render the UN Charter redundant.

I come to Gaddis largely because of his celebrity as a major historian of America and the Cold War, particularly, more recently, as the author of the post-Cold War reflections, *We Now Know: Rethinking Cold War History*.[16] These works translated him to a professorship of History and Political Science at Yale University. Gaddis argues that from the time of the 1812 War with Britain, which involved the traumatic surprise of the British burning of Washington in 1814, America's response to threats to its security has been that safety comes from enlarging rather than from contracting its sphere of responsibilities (SSAE, 12–13). Gaddis's manner of describing this process itself reveals a nationalist mindset. He says:

> Most nations seek safety in the way most animals do; by withdrawing behind defences, or making themselves inconspicuous . . . Americans, in contrast, have generally responded to threats – and particularly surprise attacks – by taking the offensive, by becoming more conspicuous, by confronting, neutralizing, and if possible overwhelming the sources of danger rather than fleeing from them. Expansion, we have assumed, is the path to security. (SSAE, 13)

It is clear that Gaddis is proud to be American and sees nothing clumsy in the extraordinary distinction he makes between Americans and most other nations as animals.

Early nineteenth-century applications of the doctrine were, first, John Quincy Adams' note to Spain that it must either garrison Florida with sufficient forces to prevent further incursions, or it must 'cede to the United States a province . . . which is in fact a derelict, open to the occupancy of every enemy, civilized or savage, of the United States . . .' (SSAE, 17). The same philosophy applied throughout the whole nineteenth-century to expansion into the Amer-Indian West, to the Mexican hinterland, and finally interventions in Central America.

A second feature of American policy, after expansionism, was unilateralism, that the US could not rely upon the goodwill of others to secure its safety, and that real independence required a disconnection from all European interests and politics. For instance, the Monroe Doctrine was based upon the premise that Great Britain would enforce it, if necessary, but the US would not agree to the common statement between the US and Great Britain to exclude other European powers

from the Americas, which Britain had proposed (SSAE, 24). Instead, even at this time the US expected to obtain what it wanted – hegemony on the American continent – without having its hands tied by an alliance with Great Britain.

The final feature of US policy highlighted by Gaddis was hegemony, that from the start the US should not co-exist on the North American continent (again J. Q. Adams) on equal terms with any other power (SSAE, 26). This policy gradually became one of making certain that no other great power gained sovereignty within geographical proximity of the US. It was a key reason for resistance to Confederate secession. Gaddis concludes that despite the difference between a continental and a global scale, the American commitment to maintaining a preponderance of power – as distinct from a balance of power – was much the same in the 1990s as in the days of Adams. The policy was always stated to avoid hypocrisy, as Bush said in June 2002 at West Point: 'America has, and intends to keep, military strengths beyond challenge' (SSAE, 30).

The underlying theory is that this tradition is so embedded in American historical consciousness that in case of default Americans will fall back on the trio of expansion, unilateralism, and hegemony. If there is a disconnection between security and how it has been achieved, it is better to accept the moral ambiguity, for instance that one does not really want to return what has been taken (such as Mexican territory), preferring to live by means that are at the same time difficult to endorse (SSAE, 33).

This part of Gaddis's argument is most cogently stated. The rest is not as clear. His problem in pointing to an American experience is that Roosevelt chose a different response to the Pearl Harbor surprise attack, one which was multilateral, based on sovereign equality and consent of allies, and which repeatedly rejected the possibility of pre-emption. There were to be four Great Powers in the UN, and a quiet American predominance would be based on consent. Pre-emption as a device was no longer necessary because the threat from the Axis, and then the Soviets, was actual, not potential (SSAE, 51–8). It is not clear why, in Gaddis's argument, the US did not take the chance to pre-empt Soviet power in Europe, nor why it preferred to build a wall which pitted the West, not the US alone, against communism. There was no felt need to rethink this in the 1990s because the US faced no obvious adversaries (SSAE, 66).

However, it is clear that even before 9/11 US leadership thinking was reverting to older patterns. Gaddis quotes the US Commission on

National Security/21st Century warning in March 2001, 'The combination of unconventional weapons proliferation with the persistence of international terrorism will end the relative invulnerability of the US homeland to catastrophic attack' (SSAE, 73–4). After 9/11 the Bush Doctrine became a program to identify and eliminate terrorists wherever they are, together with the regimes that sustain them. The return of pre-emption reflects the return of frontier danger, but today's dangers are not on a frontier, and targets can be everywhere. The National Security Doctrine (NSD) (September 2002) provides a legal form for its argument: international law recognizes 'that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.' There is a preference for pre-empting multilaterally, but, if necessary, 'we will not hesitate to act alone.' This type of pre-emption requires hegemony, so that there is 'the capacity to act wherever one needs to without significant resistance from rival states' (SSAE, 86–7).

At the same time Bush in his West Point speech and in the NSD assumes that American hegemony is broadly acceptable because the hegemon is relatively benign and it is linked with certain values, abhorrence of targeting innocent civilians for murder which associates unchallengeable strength with universal principles (SSAE, 88–9). However, there are problems of the relationship of pre-emption, hegemony, and consent (SSAE, 95). These crystallized over Iraq. The determination of the US was to shake up the status quo in the Middle East which had become dangerous to US security (SSAE, 99). Yet it unsettled Allies as well, and in eighteen months the US exchanged a reputation as the great stabilizer for a reputation as the principal destabilizer (SSAE, 101). Here Gaddis makes a distinction between Adams and Bush. The former thought the US should not go abroad in search of monsters to destroy, lest it become the dictatress of the world. It should confine itself to allowing no great power to gain sovereignty in its proximity (SSAE, 28–9). However, Gaddis comments, for the present: 'a nation that began with the belief that it could not be safe as long as pirates, marauders and the agents of predatory empires remained active along its borders has now taken the position that it cannot be safe as long as terrorists and tyrants remain active anywhere in the world' (SSAE, 110).

Gaddis himself regards this as arrogant, an equation of one nation's security as coterminous with that of everyone else (SSAE, 110). Instead, the US should return to the system of quasi-federalism represented by Cold War alliances, balancing the leadership needed

in seeking a common good against the flexibility required to satisfy individual interests. This is a reference to the consensual coalition maintained throughout the Cold War to contain international communism (SSAE, 112–13). Hegemony requires consent, which also translates the idea that Americans need to fear what the ancients called the sin of pride. They need to see themselves as others see them, for consent to hegemony rests on others having the conviction that the alternative to American hegemony is worse (SSAE, 117).

Cultural Interpretations of Certain American International Law Discourse Challenging Collective Security

What the cultural studies approach offers, perhaps with some conceit, is the possibility of understanding nuances in the uses of international law language which could very well appear collective, multilateral, and rule of law-oriented, but actually involve elisions of meaning and barely concealed, as it were, Plan B agendas, which offer unilateral strengthening of a supposedly failed multilateral resolve and a determination to enforce a single view of international legal obligation. That is to say, having already appropriated international law into American identity, American elite reactions to alternative interpretations of the law will be inclined to assume that those making the interpretations are putting themselves outside the law and beyond the boundaries of the US.

At the same time, the heart of the cultural argument concerns perception rather than concepts. Is there a danger? Why will not others face it? Why should one nonetheless act alone? Bitter arguments boil down to apparently irresolvable differences as to facts. Yet concerns about the scarceness of facts are recurrent. These concerns may point to defective qualities of judgment and perception. They may also point to a lack of a mature, reflective willingness to submit to a framework for impartial judgment.

So the cultural context argument supposes that one will be able to identify in certain American international law arguments – that is, those close to the present Bush presidency – that display characteristics typical of that presidency. It is not intended to suggest that the legal arguments are unprofessional in the sense of being opportunistic or instrumentalist. They are most probably as sincerely held as the views of the administration. Rather, the argument is, in a way, more crippling. It is that international lawyers are so embedded in the dominant American culture that they provide an unreflective and therefore

faithfully representative reproduction of the dominant culture in international law terms.

It is a very slippery matter to argue that the US is hostile to a concept of international law as such, or to a concept of collective security. As has been seen from the interpretations of Jewett, Lawrence, and Gaddis, the strongest Bush presidency supporters could argue that American and world security go together, and that the primary aim of American policy is to tighten and make more effective multilateral institutional frameworks for ensuring collective security.

In his very measured (i.e. unzealous) critique of the role of his country and of many of its international law writers and legal advisors, *The United States and the Rule of Law in International Affairs*, John Murphy argues that 'one may safely conclude that the current US administration is no fan of the collective security approach enshrined in the UN Charter.' He contrasts Oscar Schachter's definition of an indivisible peace, which all states have an interest in maintaining, with John Bolton's apparent view that the US should essentially confine interest in the threat or use of force to circumstances arguably justifiable as an exercise of individual or collective self-defense. For instance, this would cover an attack against the US itself, a close ally, or a massive threat to the US through the use of terrorism, e.g. Iraq.[17]

However, it is precisely the willingness of the US to take an apparently much more altruistic, but nonetheless disturbing, view of its mission, that both Gaddis and Jewett and Lawrence have noticed. Gaddis relates that the justification for pre-emptive strike in Cuba in 1898 culminated in Roosevelt's 'international police power' role for the US in 1904: 'Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may . . . ultimately require intervention by some civilized nation . . .' (SSAE, 21). It is rather this zealous approach which appears in the ascendancy and which puts pressure on the rest of the international community to facilitate a multilateral approach, under menace of unilateralist behavior by America *if the rest of the world fails in its duties*. Jewett and Lawrence see in this type of reasoning an unconscious equation of American and universal interest, rooted in a zealous self-righteousness, which, by definition, is unreflective. The logic of the anti-communist crusade was a mirage of the US as a selfless Christian nation (in the eyes of John Foster Dulles) struggling against a conspiracy of evil (CACAE, esp. 90). In a section titled 'Arrogant missteps of global idealism,' the authors point to the tendency, reappearing in the Kennedy Administration's religiosity, to treat God as man's

'omnipotent servant,' with 'faith as a sure-fire device to get what we want' (CACAE, 96). This led to the Kennedy myth of calibrated brinkmanship, 'the belief that if you stand tough you win' (CACAE, 100). Jewett and Lawrence trace Britain's place in this crusade back to Churchill. He had warned that to check the expansion of the communist bloc 'the English-speaking peoples – a sort of latter-day *master race* – must sooner or later form a union' (CACAE, 80).

The difficulty with this brand of collective security again comes with the US's response to 'the failure of resolve' of others to confront 'immanent threats.' Take again Murphy's measured critique of his country and some colleagues concerning Kosovo. Murphy goes against the general current of scholarship and opinion that intervention by NATO was justifiable, morally if not legally, as a form of humanitarian intervention in the face of an impending humanitarian disaster. In an extensive treatment, he points to the fact that NATO imposed as a last-minute condition for the Rambouillet negotiations – when it looked as if they were succeeding – a NATO force with free access to Serbia, and independence for Kosovo after three years. NATO violated the Charter when it did not return to the Security Council after talks broke down.[18] As for the humanitarian argument, a ground military intervention might have been appropriate, but the exclusive reliance on bombing both exacerbated the situation hugely in Kosovo and led to a great loss of civilian life in Serbia.[19]

Yet it is possible to take a different perceptive on these events in the eyes of the 'zealots' of the new Bush approach to a 'collective security of the willing.' Such a precedent as the Kosovo NATO intervention points both to the way the Security Council should go in the future and how the Coalition of the Willing should go, if the Security Council fails in its resolve. In the July 2003 issue of the *American Journal of International Law*, among a wide range of contributing authors, there are a number who, in my judgment, show an unambiguous black-and-white perception of the nature of *evil* (terrorist threats and rogue states) which turn issues into resolve and willingness to use force in the face of indisputable danger. Everywhere precedents exist of coalitions of the willing. Kosovo is one such precedent.

This is how Jane Stromseth presents what still appears essentially a constructive proposal for a resurrected collective security within the United Nations. In *Law and Force after Iraq: A Transitional Moment*,[20] she notes that all major protagonists in the Security Council seek to explain their actions within its framework and the Security Council itself has shown an evolution of the idea of 'threats

to the peace' to included humanitarian emergencies, protection of democracies, etc. (633). Stromseth accepts that the new American NSD, as a response to 9/11, has raised concerns about the reassuring nature of US power in many parts of the world (636). Yet through the later 1990s and in the immediate buildup to the 2003 war, the Security Council *lacked the collective spine on Iraq* (636; author's italics). She opposes France's wish to use the Security Council to counteract American power, while the final fact nonetheless remains 'if France and others are not willing to support coercive diplomacy backed by a credible – and authorized – threat of force, then the United States will cease to turn to the Council . . .' (637).

The fundamental issue and the recommended institutional response are defined in carefully chosen, but ultimately zealous, terms: '[W]hat is especially needed today is a careful re-examination of the concept of imminence as well as of 'necessity' and 'proportionality' – in short the scope of the right of self-defense – in response to the urgent and unconventional threats posed by terrorist networks bent on acquiring weapons of mass destruction . . .' (638). Immediately, it is clear that regional self-defense organizations would be a good place to start (638). There is the ANZUS, for Australia has experienced directly the harm of terrorist attacks (638 – supposedly Bali). The next step could be to work with Britain and others on a similar initiative within NATO. The OAS could be next (638).

None of this need appear a challenge to the doctrine of collective security, that is unless one wonders about the 'fallback' position if, in the view of America, collective collaboration fails.

At one level Stromseth is clearly advocating multilateralism, but for Jewett and Lawrence that was usually unbalanced in favor of American-dominated intentions, even during the Cold War. Stromseth argues: 'America's friends and allies will be critically important in long-term counter-terrorist efforts . . .' (639). But what if America's friends fail her? In the 1990s there was an increasing disconnection between Security Council mandates and the means to enforce them, for some of which Stromseth blames the US. However, in other cases, 'coalitions of the willing enforced Security Council demands when the Council was not prepared to expressly authorize force – as in the 1991 efforts to protect Iraqi Kurds, the 1999 intervention in Kosovo, *and the 2003 Iraq war*' (628; author's italics). Stromseth shows no awareness that the Kosovo action was problematic in the sense highlighted by Murphy and numerous other very

prominent Americans he cites, such as Richard Bilder and Zbigniew Brzezinski.[21] One has to be completely clear that, for Stromseth, Kosovo and Iraq are all about *collective spine in the face of an evident danger that requires an automatic response*. Whether there are independently agreed criteria to determine whether international legal standards had been violated and what might then be a legally permissible response are not matters Stromseth considers.

The priority for *resolve* over careful deliberation is clear in Stromseth's recommendations for Security Council revitalization. In her view others are making pleas for equity in representation, while what is really needed is a category of long-term non-permanent member that clearly articulates the contribution it is prepared to make – in terms of finances, material, or forces, to maintain peacekeeping and other enforcement purposes, including such UN purposes as the protection of human rights (641).

Another attempt to bring together Bush's new war strategy and collective security is Richard Gardner's *Neither Bush nor the 'Jurisprudes.'*[22] Here, once again, it is necessary to read between the lines of Gardner's argument to recognize the underlying cultural patterns it represents. The Bush doctrine of pre-emptive self-defense, as a doctrine of general application, is so ominous as to merit universal condemnation. As Gardner says, effectively, it would give *ex post facto* justification to Japan's attack on Pearl Harbor (588). The proper way to approach the Iraq problem was by reference to previous UN Security Council resolutions about material breach, although when the US finally realized this, public opinion at home and abroad had come to see the Iraq War as the first application of a new doctrine of preventive war (588–9).

Gardner's concept of collective security once again means that states should aim to implement their view of the meaning of Security Council resolutions, along with such other states as are willing to meet their obligations. The decisions of NATO (invoking art. 5 of the NATO in the context of terrorist attack) and the United Nations 'provide a sufficient legal basis for military actions the *United States needs* to take to destroy terrorist groups operating in countries that do not carry out their obligations to suppress them . . .' (589; author's italics).

Once again, there is a totally uncritical treatment of the so-called Kosovo precedent, as a way of representing regional backup for the universal organization. Gardner says that the successful military campaign undertaken by NATO to put an end to ethnic cleansing in

Kosovo 'protested against by some UN members but not disowned by the Security Council, provides another example of a reinterpretation in practice of Article 2/4, this time to permit humanitarian intervention to stop genocide or a similar massive violation of human rights where the intervention has the sanction of a regional organization' (589).

Gardner's arguments need to be read very carefully. The importance of his conclusions is in the last sentence. The Bush Administration is right to ask for international law to be re-examined in the face of the new dangers of *catastrophic terrorism* but wrong in its proposed solution. Instead, a modest reinterpretation of the UN Charter is enough. In particular, out of four interpretations, the one most in keeping with the Kosovo and Iraq 'precedents' is the first.

> Armed force may now be used by a UN member even without Security Council approval to destroy terrorist groups operating on the territory of other members when those other members fail to discharge their international law obligations to suppress them.

In terms of the analysis of Jewett and Lawrence, who question the emotional and psychological stability of their *fellow Americans* (author's italics) when they perceive danger, Gardner's reinterpretation is once again a form of *carte blanche*. It is no wonder that Gardner concludes his modest proposal to find his way between Bush and the 'Jurisprudes' with the words: 'The United States needs to claim no more from international law than this. The rest of the world should concede no less' (590). No sentence could show more clearly what Gardner means by collective security. There is an objective necessity that America will recognize, and one can only hope that one's allies will as well.

Similar comments may be made about the arguments of Ruth Wedgwood, in *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*.[23] She sets as her task 'whether to accept the procedural blockage of the Council, or to seek an alternative route to legitimacy and the recognition of legality' (577). Of course, procedural blockage, much like Blair's 'unreasonable veto,' means opposition to the wishes of the US and its Allies. West African regional organization practice in relation to Liberia and Sierra Leone, as well as NATO's intervention over Kosovo, would suggest that regional organizations might be able to take enforcement action without prior Security Council approval. Wedgwood recognizes there are difficulties in predicting customary law change, but the

characterization of evil personalities is not long in coming and shows clearly the US 'cops and robbers' view of the world:

> But surely one central ingredient is the moral necessity of action – the credible invocation of shared community purposes. Indeed, Justice Holmes' 'bad man' theory of law may have an unexpected application – whenever a particularly disruptive personality causes more than one genocidal conflict, alternative methods of countering his renewed threats are likely to be tolerated. This theory of exception plausibly fits the example of Slobodan Milosevic and Charles Taylor, as well as Saddam Hussein.
>
> It is a further step to suppose that any *non-regional* 'coalition of the willing' can substitute for Council action . . . In the light of the UN Charter's human rights commitments, the new Community of Democracies may be entitled to more substantial weight than any geographical artifact. (578)

This long quotation illustrates a total dissolution of the formal aspect of law into a series of material, somehow, authoritative judgments about evil to be punished, which takes on a definitely new character, now that the Cold War is passed, in terms of the post-9/11 threat of terrorist attack in the form of WMD. The 'bad man' takes on a cosmological dimension. Wedgwood distinguishes deterrence and containment as the core doctrines of the Cold War. The brave new world is where there are no credible disincentives to non-state terrorists who have access to WMD. Indeed, a 'rogue state that is utterly heedless of its people . . . may not care about the potential collateral damage from a responsive military strike' (582). The question is whether a state can use preemptive force in unique cases

> when intelligence is reliable and timing is sensitive, and a state is sponsoring or hosting a network acquiring weapons of mass destruction . . . [T]he abstract answer to many strategists is yes – a given regime might have a record of conduct so irresponsible and links to terrorist groups so troubling that the acquisition of WMD capability amounts to an unreasonable danger that cannot be abided . . . In a teleological understanding of the Charter, strengthened by commitments to human rights and democracy, defensive force may be necessary to counter the unpredictable violence of states and non-state actors. This should inform the reading of Article 51 as much as the scope of Chapter VII . . . (584)

Once again the whole remit of a formal approach to law vanishes. Instead, one has the unilateral demonization of the opponent with whom one is in no human relationship whatsoever. Indeed, it is precisely the teleological interpretation of a very general reference to

international law, the so-called principles of democracy and human rights embedded in the UN Charter, which allows the 'Community of Democracies' to draw an absolute boundary between themselves and the 'other,' the rogue states and the 'terror network with unworldly motivations' (583). The two elements of Campbell's characterization of the working of identity are most clearly present here.

First, there is the projection of responsibility and evil entirely outside of oneself onto the other. International law merely functions as an additional, boundary-drawing instrument to achieve this goal. Of course, the Community of Democracies and the rogue states and non-state terrorist networks are an, as it were, standard postmodern example of a binary opposition. The self and the other are not separate. They are a single entity. The second dimension of Campbell's analysis, here vitally illuminated by Gaddis, is the repetitive application of this defensive identity mechanism, through the specific instrument of the preemptive attack on terrorists and rogue states, following the end of the Cold War and the disappearance of the 'communist menace.' Gaddis himself thinks the Cold War was remarkable for American abstention from the doctrine of preemptive attack, but he does say it will appear where America feels most acutely threatened, America meaning the embattled post-Westphalian unsuccessfully secularized identity of which both Campbell and Jewett/ Lawrence write.

Finally, John Yoo, in *International Law and the War in Iraq*,[24] operating within the same parameters as Wedgwood (i.e. non-state terrorist networks and rogue states) elaborates considerably on Wedgwood's analysis of how defensive measures to counter the unpredictable violence of states and non-state actors should inform a reading of Article 51, etc. The three criteria for the use of preemptive force that Yoo elaborates all depend upon judgments about levels of danger and material perceptions of the other. The first question is whether a nation has WMD and the inclination to use them. Apart from the Iraq case, in future the decision will depend upon intelligence about rogue nations' WMD programs and their ability to assemble a weapon (575). The second question nations will have to take into account is what Yoo calls 'the available window of opportunity.' The problem is, of course, the suicide bomber, immune to traditional methods of deterrence, besides being difficult to trace in innocent populations. The 'window of opportunity' may exist for the 'United States and its allies' before a rogue nation transfers weapons to a terrorist organization. If it had to wait for the transfer to occur, it would be more difficult for 'the United States, for example' (now

apparently without its allies), to act, given the sporadic nature of terrorist attacks (575). The third question, or consideration, is the degree of harm from a WMD attack, given that 'the combination of the vast potential for destructive capacity of WMD and the modest means required for their delivery make them more of a threat than the military forces of many countries' (575).

The final stage of Yoo's argument has the merit that it is reduces to nonsense a whole tradition of secular authority in international relations that Campbell highlights as beginning with Hobbes and the Westphalia settlement: the apparent construction of order based upon the opposition of the domestic and the foreign and the paradox of a state system, which rests upon the mutually exclusive suppositions that each is a self for itself and an other for all the others. Yoo finds himself, along with the whole of the international law profession, trapped in what is not a logic of his own making. Starting from the reasonable supposition that the degree of harm from an WMD attack would be catastrophic, he appears to commit himself to the view that danger is unlimited in degree, all-pervasive in extent, and requiring ceaseless preemptive attacks. In other words, we are in an impossible position, at the bankrupted end of an international law tradition:

> Thus, even if the probability that a rogue nation would attack the United States directly with WMD were not certain, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if the United States did not act, the threat would increase, could lead a nation to conclude that military action is necessary in self-defense. Indeed, as President Bush recently cautioned: 'If we wait for threats fully to materialize, we will have waited too long.' (576)

Notes

1 Revised edition (1998).
2 Ibid., 46.
3 Ibid., 47, quoting Hans Blumenberg, *The Legitimacy of the Modern Age* (1983), xxiv.
4 Ibid., 48–50.
5 Ibid., 51.
6 Ibid., 65.
7 Ibid., 31.
8 Ibid., 62.
9 Ibid., 65.
10 In *The Dilemma of Zealous Nationalism* (2003).
11 Harvard University Press, 2004.

12 Especially chapters 5 and 6.
13 Harvard University Press, 1990.
14 *New York Times*, October 17, 2004. I am grateful to my Westminster and American law colleague Andrea Jarman for bringing this article to my attention.
15 Jewett and Lawrence explain Wallis's own theological views about responses to 9/11 at CACAE, 3.
16 Council of Foreign Relations (1997).
17 Cambridge, 2004, 192.
18 *The United States* etc., 155.
19 Ibid., 160–1.
20 *AJIL* 97, No. 3 (July 2003) 628–42.
21 *The United States* etc., 155 and 161.
22 *AJIL* 97, No. 3 (July 2003) 585–90.
23 *AJIL* 97 No. 3 (2003) 576–85.
24 *AJIL* 97 (2003) 563–76.

6

MARXISM AND INTERNATIONAL LAW

Introduction

Rumors of the death of socialism have been, oddly enough, accompanied by rumors of the disappearance of the United States. Poststructuralists tell us that we are all victims now but that, somehow, the multitude will arise against 'the Powers.' Power enslaves us all in its impersonality, but resistance is everywhere. A primary focus of this study is Michael Hardt and Antonio Negri's *Empire*, a poststructuralist and, at the same time, postmarxist critique of globalization.[1] This chapter will argue against those authors that an updated theory of capitalist imperialism convincingly captures the contemporary international scene. The brutal power of the United States is everywhere. It is infinitely destructive of international law. Postmodernism is the exhausted moral spirit of the old Europeans and the ghosts of Marxist interpretations of imperialism offer us the most convincing explanations as to why the violence of the United States increases by the year.

In this view Marxism does not offer a theory of international law as such but merely a contemporary, up-to-date explanation of why it is being systematically, or structurally, violated. Marxism is presented as a vision, an analysis of a condition, essentially pessimistic in its tracing of an increasing intensification of exploitation on a global scale, violently promoted and protected by the United States and its allies, the so-called 'coalition.' So, the contradictions of capitalism are reflected in the contradictions of international law.

However, law as such is not merely an ideological legitimation of capitalism. Law as such is also a positivist identification or equation of the idea of law with that of the state, in particular the United States. Law, as an instrument of coercion by the state, as a concentration of capitalist power, facilitates the fragmentation and oppression of the world community. However, international law as such, in the Western tradition going back at least to Westphalia, is definitely not an

ideological instrument in this program. Its flagrant violation points the way back to an ordered humanity based upon principles of the equality of states, economic and social justice, reached through negotiation and dialogue, but having to rest on an equilibrium of force.

POSTSTRUCTURALISM AND THE END OF MARXISM

The greatest strength of poststructuralism is essentially emotional, atmospheric. It reflects the collapse of the revolutionary spirit of May 1968 in France, the decay of Keynesian social democracy and of 'real existing socialism' in the Soviet bloc. The onward march of monetarism and neoliberal economics makes it appear that every micro-decision is a profit-and-loss accounting exercise, whether it is the running of a hospital, a university, a company, or a nation-state. The latter is supposedly powerless to regulate a molecular capital monetary flow that appears to permeate every nook and cranny of social being.[2] Economic nationalism and social democracy both have to give way to the inexorable drive of market opportunity. The rhetoric is that the market-state provides the open forum for opportunity, in contrast to the nation-state that attempted to impose legal regulations on behalf of particular moral commitments.[3] The reality appears to be that the relentless drive of the all-consuming market sweeps away all social democratic attempts to direct investment or stem speculative currency transactions that play havoc with democratic controls of the economy. These arguments have to maintain that capital has no significant territorial location and no particular social concentration. Yet in *Empire* they become an irrationalist cult of pessimism and even nihilism in the face of the impossibility of social change for which the call of the multitude to arise is a hopeless remedy.

From within the international law confraternity perhaps the strongest and most authoritative recent espousal of these views comes from Martti Koskenniemi.[4] In rather a forceful tone Koskenniemi announces:

> The time of conspiracies theories is over. There is neither an overall 'plan' nor overarching wisdom located in the United States, or elsewhere . . . But instead of making room for only a few non-governmental decision-makers I am tempted by the larger vision of Hardt and Negri that the world is in transit towards what they, borrowing from Michel Foucault, call a biopolitical Empire, an Empire that has no capital, that is ruled from no one spot but that is equally binding on Washington and Karachi, and all of us. In this image there are no interests that arise from states – only interest

> positions that are dictated by an impersonal, globally effective economic and cultural logic. This is a structural Empire which is no less powerful as a result of not being ruled by formal decision-making from anywhere . . .

It is quite possible that international lawyers should simply absorb what I have already called the atmosphere of poststructuralist gloom. In *Cultural Pessimism, Narratives of Decline in the Post-modern World*, Oliver Bennett places economic developments since the early 1970s in a wider context of Western cultural decay. He traces the immediate cause of contemporary economic anomie to the break from fixed to floating currency exchanges in 1973. This marked the end of the balance between organized labor, large corporate capital, and the nation-state.[5] The post-1973 shift to speculative financial markets ($1.5 trillion in 1997) means these come to more than fifty times the level of daily world trade. The role of futures and derivatives – a global bond market of $200 billion a day compared to $25 billion trade in equities– marks the independent force of global finance with its own laws. The same measureless expansion in the role of the trade of multinational enterprises (MNE) reaches in 1998 $16.3 trillion a year, growing at 8 per cent, with intra-MNE trade at about 50 per cent of all international trade. Transport costs are negligible in comparison to savings in raw materials and labor costs, brought about by mobility. [6]

What is crucial is the sociopolitical impact of these developments. The commitments of shareholders to companies can be cut by a phone call, leading to slash-and-burn restructuring strategies. Factor-price equalization means that workers' salaries can be kept at a lowest global common denominator, and for 70 per cent of American employees salaries are stagnant or declining. It is impossible to tax corporate profits that can so easily move to cheaper locations. As a percentage of US revenue they are down from 39 per cent in 1939 to 12 per cent in the 1990s, resulting in huge public borrowing commitments and budget deficits. The greater inequality of the new capitalism means a propensity to uncontrollable structural change, merging, downsizing, with a consequent breakdown of all connective ties of family, friendships, and communities. This is the economic background to crime, divorce, and other social breakdown–an untrammeled individualism in transactional societies – where long-term co-operative relationships are replaced by short-term market transactions, governed by expediency and self-interest. These market values spread into medicine, education, etc. and signify the end of common interest.[7] Some predict an immanent disintegration of the

global capitalist system, with a new capitalism locked into a negative dialectic with tribalist identity politics, where a mounting scarcity of resources and conflicts of interests are matched by a decreasing capability for cooperation.[8]

Bennett places these economic developments alongside developments in politics, sciences, and the arts, pointing to a general culture indicating marks of clinical depression. Global capitalism leads individuals into feeling trapped, with no control over their lives. Rampant individualism is accentuated by maladaptive social comparisons, pressurizing with overwhelming idealized standards, in an environment of unprecedented levels of competitive assessment in education and employment – a modern plague of the law of self-esteem. This is all within a framework of consumerism focused on increased personal insufficiency – which operates with an increased differentiation of products whose built-in deterioration engenders perpetual dissatisfaction in the consumer.[9]

Parallel developments in the political aspect have been, since the nuclear standoff of the Cold War, a threat of nuclear extinction, which causes a moral sickness, a disassociation from feeling that is necessary to exist in a society threatened by annihilation. The widespread numbing of moral sense encourages a Dionysian immersion in sensation, leading to ever-increasing levels of schizophrenia and anomie. Chaos paradigms of world society multiply, as there is breakdown of the governing authority of states, and a transfer of power to sectarian groupings, criminal organizations, and private security agencies. The most obvious source of immediate political danger comes from the increasing sectors of third world societies dropping out of the world economy, providing a source of growing resentment, which easily leads to terrorism, given the access to arms, explosives, and other means of aggression.[10]

The prevalence of terrorism, for Bennett, is best understand in the wider climate of total political disintegration, marked by epidemics of torture, genocide, and politicide, which McBride, speaking for Amnesty International in the 1960s, said marked a massive breakdown of public morality and of civilization itself. By the 1980s over a third of the world's governments used torture and Amnesty could note that public campaigning made no difference. There was no public outrage. The figures of genocides and politicides (government-sponsored murders) range to nine million and twenty million respectively. The crucial dimension is comparison fatigue and the failure of any 'political' process of response.[11]

The criticism that Marxists make of poststructuralist elaborations of this picture is the depoliticizing impact they provide. They offer an alternative ideology that does lead to the multiple resistances of which Koskenniemi speaks, but they add significantly to the realistic, empirical picture that Bennett has presented. Foucault's anti-Marxist decentralized contestation of power resists what it sees as any attempt to replace one set of social relations with another – which would only be a new apparatus of power-knowledge. Rather than being unitary, power is a multiplicity of relations infiltrating the whole of the social body, with no causal priority to the economic. This process does not simply repress and circumscribe people, but constitutes them. Power evokes resistance, albeit as fragmentary and decentralized as the power relations it contests.[12]

The constitutive character of knowledge has been identified as a key epistemological foundation of cultural pessimism. Bennett points to the argument that knowledge as a way of life is impossible: either we are on the outside – in which case its essence eludes us – or we are on the inside and too close.[13] For Foucault, also, power is always already there; one is never outside or on the margins. Resistance is possible but it is nothing more than the oppositional other of the prevailing apparatus of power – knowledge, minor, local knowledges in opposition to the scientific hierarchization of knowledges. This can appear as a theoretical foundation for pluralism – opposition to a so-called will to totalize that is a refusal to accept the possibility of difference and discontinuity. Instead, it should be recognized that there are irreducibly different perspectives, each in its way critical of existing social reality. This approach reflects the rise of a medley of social movements – feminists, ecologists, black nationalists, etc. They all insist upon change without a totality, piecemeal. Yet the Foucault perspective, in a Marxist view, is itself a total vision that evacuates any political content from the concept of resistance, objecting to any political action except waging war on the totality.[14]

These ideas are reproduced in *Empire*, and the argument here will be that the ideas do not, in spite of the metaphysical aura of postmodernism, become good political-economic theory or empirical analysis. The rhetorical, virtually magical style of this work makes it difficult to engage with its arguments. Its mystical adulation of speculative currency flows and MNEs is irrepressible. For instance, the following is typical of the authors' style: 'The huge transnational corporations construct the fundamental connective fabric of the biopolitical world in certain important respects . . .' etc. Now they

(i.e. the MNEs), 'directly structure and articulate territories and populations' etc.[15] In the same nonsensical style they pronounce that the supposedly complex apparatus that selects investments and directs financial and monetary maneuvers determines 'the new biopolitical structuring of the world . . .' They tell us 'There is nothing, no "naked life", no external standpoint, that can be posed outside this field permeated by money; nothing escapes money . . .' The authors stand in hopeless awe of what they call the great industrial and financial powers which produce not just commodities, but subjectivities, that is – wait for it – 'agentic subjectivities within the biopolitical context: they produce needs, social relations, bodies, and minds – which is to say, they produce producers . . .'[16] In metaphysical terms what Hardt and Negri are doing is simply to deny any dialectic between structure and agency. Structure is everything. This makes it metaphysically impossible for them to conceive of anyone or any particular grouping having actions ascribed to them. So they tell us 'The machine is self-validating, autopoetic – that is systemic. It constructs social fabrics that evacuate or render ineffective any contradiction; it creates situations in which, before coercively neutralizing difference, seem to absorb it in an insignificant play of self-generating and self-regulating equilibria . . .' etc.[17]

There are 400 pages of this convoluted rhetoric. In the space of a chapter it is proposed to highlight the flourishes with which the authors dispose of the nation-state as a possible form of political defense of social democracy, and then consider the economic power of the US, the crisis of 1973, financial deregulation, and the relation of the US to the MNEs.

Hardt and Negri object that the concepts of nation and nation-state faithfully reproduce the patrimonial state's totalizing identity of both the territory and the population. Relying on sovereignty in the most rigid way, nation and nation-state make the relation of sovereignty into a thing, often by naturalizing it, 'and thus weed out every residue of social antagonism. The nation is a kind of ideological shortcut that attempts to free the concepts of sovereignty and modernity from the antagonism and crisis which define them' etc.[18] Apparently, Hardt and Negri know that Luxemburg's most powerful argument was 'that nation means dictatorship and is thus profoundly incompatible with any attempt at democratic organization . . .'[19]

The nation or the people it produces is contrasted with the multitude. The former is something that is one, having a will, and to whom one action may be attributed, it commands. The multitude is

'a multiplicity, a plane of singularities, an open set of relations, which is not homogenous or identical with itself and bears an indistinct, inclusive relation to those outside of it . . . the construction of an absolute racial difference is the essential ground for the conception of a homogenous national identity . . .'[20] Even the nation as the dominated power will, in turn, play an inverse role in relation to the interior they protect and repress internal differences, etc.[21]

In contrast, the US has a constitution that favors the productive synergies of the multitude rather than trying to regulate them from above. This encourages the expansiveness of capitalism which, supposedly, does not know an outside and an inside (i.e., it is all-absorbing). The US Constitution provides the opportunity for the decentered expansion of capital.[22] This apparently makes the US especially suited as an instrument of the global events since the early 1970s . Hardt and Negri's account is rather neutral: 'Little by little, after the Vietnam War the new world market was organized: a world market that destroyed the fixed boundaries and hierarchical procedures of European imperialisms . . .' After US power had destroyed European colonialisms, 'the army of command wielded its power less through military hardware and more through the dollar . . . an enormous step forward towards the construction of Empire . . .'[23]

The second mechanism for its construction was a process of decentering the sites and the flows of production. The transnationals transferred the technology necessary for constructing the new productive axis of the subordinate countries and mobilized the labor force and local productive capacities in these countries. Rather strangely, the authors conclude this part of their argument as follows: 'These multiple flows began to converge essentially towards the United States, which guaranteed and coordinated, when it did not directly command, the movement and operations of the transnationals. This was a decisive phase of Empire. Through the activities of the transnational corporations, the mediation and equalisation of the rates of profit were unhinged from the power of the dominant nation-states . . .'[24]

So, one might ask, why did Nixon have the wit to decouple the dollar from the gold standard and put a surcharge of 10 per cent on all imports from Europe to the United States, a transfer of the entire American debt to Europe? It 'thus reminded the Europeans of the initial terms of the agreement, of its (the US) hegemony as the highest point of exploitation and capitalist command . . .'[25]

Yet nation-state resistance must always be rejected as an option, being a metaphysical impossibility. If it is argued that through the

imposition of imperialist domination the underdevelopment of subordinated economies was created and then sustained by their continued integration into dominant capitalist economies, it is still an invalid conclusion that disarticulated developing economies should aim for relative isolation to achieve their own full articulation. Instead, the tendential realization of the world market should destroy any notion that today a country or region could isolate itself or delink itself from the global networks of power. The interactions of the world market have resulted in a generalized disarticulation of all economies.[26]

The fetishization of the US economic policy decisions of the 1970s follows. In italics the authors announce that the state has been defeated and that corporations rule the earth. Politics has disappeared and consensus is determined by economic factors such as the equilibria of trade balances and speculation on the value of currencies. The mechanisms of political mediation function through the categories of bureaucratic mediation and managerial sociology. This means that single government has been disarticulated and invested in a series of separate bodies, banks, international organisms of planning, etc.[27] Notwithstanding these categorical statements the authors still insist that at the top of the pyramid of world power is the US with a group of nation-states which 'control the primary global monetary instruments and thus have the ability to regulate international exchanges. Only the United States itself has the global use of force'. On a second tier, under this umbrella come the transnationals that organize what the authors call the networks, already many times described.[28] Never tired of contradicting themselves the authors tell us once again that it is foolish to harbor nostalgia for the nation-state, either as a cultural or economic-juridical structure. Its decline can be traced through the evolution of a whole series of bodies such as the GATT, the WTO, the World Bank, and the IMF. Even if the nation were to try to resist, it could only be worse, since 'the nation carries with it a whole series of repressive structures and ideologies'. [29]

The resistance to a dichotomized focus on third world nation-state and US imperialism is in favor of the postcolonial hero, 'who continually transgresses territorial and racial boundaries, who destroys particularisms . . . liberation means the destruction of boundaries and patterns of forced migrations . . .' For the most wretched of the earth, 'its new nomad singularity is the most creative force . . . The power to circulate is a primary determination of the virtuality of the multitude, and circulating is the first ethical act of a counter-imperial ontology . . .'[30] So the authors are not denying the focused power of the

US and its imperial allies. Rather, they claim that this power is irrelevant to the future liberation of their postmodern hero. The means to get beyond the crisis of empire 'is the ontological displacement of the subject.'[31] They offer a kind of millennial spirituality. Calling on St Francis of Assisi, they say that once again we find ourselves in Francis's situation 'posing against the misery of power the joy of being . . . biopower, communism, cooperation and revolution remain together, in love, simplicity and also innocence . . . This is the irrepressible lightness and joy of being communist . . .'[32]

National Sovereignty and Economic Reform

Poststructuralist pessimism poses the danger of political resignation and passivity, or simply total moral and intellectual confusion. What if it were the case that responses to imperialism, or what might condescendingly be described as the conspiracy of imperialism, were possible? Maybe there are perfectly obvious and feasible responses to the ills of the global economy that states cannot implement because these responses are resisted by other more powerful states whose own interests argue against them. First, one needs simply to set out what reforms are required and then explain how they are being blocked. Then, hopefully, the mist of Empire will evaporate.

Joseph Stiglitz, a former chief economist to the World Bank, and chief economic advisor to President Clinton, considers that it is possible to adopt a non-mystical approach to international monetary problems, particularly as they affect developing countries. He sets out two starting principles for his argument in favor of government intervention in the market. It should happen where there is imperfect information and where social cohesion is threatened. In this event an economy will not function rationally. Starting from these principles Stiglitz argues quite simply that no case has been made for capital market liberalization.[33]

In summary, for Stiglitz monopoly concentration of capital, in the interest of a small number of creditor states, particularly the US, operating through a secretive, undemocratic IMF, serves acutely dysfunctionally the interests of most developing, i.e. poor countries. The creditor states resist change simply because it is in their financial interest to do so. Immediate prospects for the necessary political reform at the global level are not good.[34] The IMF rhetoric that liberalization would enhance world economic stability by diversifying sources of funding is nonsense. Banks prefer to lend to those who do not need

the money. The limited competition in financial markets means that lower interest rates do not follow. The so-called freedom of capital flow is very bad for developing countries, because there is no control of the flow of hot money in and out of countries – short-term loans and contracts that are usually only bets on exchange rate movements. It consists of money that cannot be used to build factories, etc. because companies do not make long-term investments with it. Such a financial climate can only destabilize long-term investments. There are bound to be adverse effects on growth in this environment because countries have to set aside in their reserves amounts equal to their short-term foreign-denominated loans, e.g. if country A borrows $100 million at 18 per cent it should deposit the same in US Treasury bills at 4 per cent, there by losing 14 per cent.[35]

Where benefits are not paid for, or compensated, global collective action is necessary, that is, externalities to achieve global economic stability. The mind-set of the IMF is that it will vote to suit creditors and a change in weighted voting cannot come with the US using its effective veto. Yet the contributions are actually coming from the developing countries as the IMF is always repaid. Stiglitz is not sanguine that the necessary reforms in this institution will come. Indeed, if there was even open debate in the IMF it is not clear that the interest of creditors would always come before those of workers and small businesses. Secrecy always allows special interests full sway and engenders suspicion.[36]

The institutional solutions are clear. Banking and tax restrictions must be imposed to ensure effective restrictions on short-term capital flows. A bankruptcy provision is needed that expedites restructuring and gives greater presumption for a continuation of existing management, thereby inducing more diligence in creditors. The IMF role in debt restructuring is fundamentally wrong. The IMF is a major creditor, representing major creditors, and a bankruptcy system can never allow creditors to make bankruptcy judgments.[37]

The rest of the institutional changes necessary are perfectly clear. They have nothing to do with bureaucracy and efficiency and everything to do with the equity which political choice must realize. The risk-based capital adequacy standards imposed on developing country banks are inappropriate. The IMF must be required to expand substantially its Special Drawing Rights to finance global public goods to sustain the world economy. The risks of currency fluctuation must be absorbed by the creditors and the concerns of workers and small businesses have to be balanced against those of

creditors. There must be global taxation to finance development. It is quite simply because alternative policies affect different groups differently that it is the role of the political process – not international bureaucrats – to sort out the choices.[38]

So, why has Stiglitz cause not to be sanguine about these obvious reforms to the world financial system?

Characteristics of Late Capitalism and the Structure of International Relations

There are several apparent contradictions in capitalism. Industrial or productive capitalism tends to become, gradually, financial capitalism. That is, such productive capitalism accumulates greater and greater profit, which it then has increasing difficulty placing, as it is not necessary or perhaps even possible to reinvest the capital in productive processes to serve an ever-shrinking market. This is because of the exploitative conditions inherent in the ownership of the means of production under capitalism. Profit comes from the transfer of the surplus value of labor, necessitating a reduction in the scope and extent of consumer demand.[39] It then drifts into increasingly scare – because demanded – assets, such as derivatives and real estate, which acquire speculative values.

The surplus capital is exported into production abroad which then becomes significantly competitive with the home producers, while still competing for the same limited consumer markets. In their classical study *Chaos and Governance in the Modern World System*, Arrighi and Silver set out the historical framework of modern capitalism in its development from industrial to finance capitalism. Just as the hegemony of the Dutch Republic, and after it the British Empire, exported capital to finance their eventual rivals, so also did the US from 1945 until the 1970s. The crisis of US hegemony was marked by the abandonment of the dollar gold standard and the floating of currencies in the early 1970s. Just as with the former hegemonies, the US had built effective rivals out of Western Europe, Japan, and increasingly, the Pacific Rim.[40] Because of the capitalism-induced concentration of markets, almost the only effective outlet for the increased productive capacity of these rivals is the US itself. Equally, the consumer boom in the West, and particularly in the US, is credit-led, marked by the capacity of US oligarchies and its 'coalition' to corner surplus liquidity.[41]

So international economic relations are increasingly marked by a dependency of the greatest consumer of world manufactures and

natural resources, the United States, on the producers, Western Europe, Japan, and the Pacific Rim, through the medium of increasing American debt. An advantage that the US has had from the time after 1945, when it dominated world production and trade, is the dollar. By fixing the value of its own currency as the world currency, it can pay its debts by printing money.[42] This is where the Stiglitz critique can become focused. The absence of world monetary reform has nothing to do with the 'money, money everywhere' rhetoric of Hardt and Negri, but has everything to do with the usefulness of the fiscal and monetary control of one world currency by a single power.

However, the full context of the usefulness of this power can only be understood if another aspect of the concentration of wealth and avoidance of income redistribution is stressed. The way out of surplus production for the US, since the 1930s, has been the war economy, military production financed by the state, first through domestic income, but eventually through the control of world liquidity. [43] That is, the US found its way out of the Great Depression by adopting the 'warfare–welfare' economy of armaments, which retained its impetus, after the defeat of Germany and Japan, through the Czech Crisis (the Prague communist coup of February–March 1948) and the Korean War.

Since then the US has remained primarily a war economy driven by the need to confront external danger at a global level. This feeds effectively on the paranoid style that is fundamental to US foreign policy. Harvey explains that the internal configurations of power that were able to resist Roosevelt's modest attempts during the New Deal to rescue the economy from its contradictions through redistribution of wealth, meant instead the paranoid style of politics. The difficulty of achieving internal cohesion in an ethnically mixed society characterized by intense individualism and class division made for the construction of US politics around the fear of some 'other' (such as bolshevism, socialism, anarchists).[44] This aggressive policy extends to an unequal military alliance system which ensures transfers of profit back to the US through compulsory purchases of American armaments, an effective export of the 'warfare–welfare' economy.[45]

It is widely recognized that these economic contradictions accentuate further political contradictions. First, there is the changing character of American military dominance at the global level. This dates from 1945 and the US reconstruction of Germany and Japan as semi-sovereign states, as US protectorates. Under a US military umbrella, they were free to redevelop their own industrial potential. By the time

of the Korean War the US had ringed the Soviets and Chinese with an unprecedented number of military bases, which meant that not merely were there only two superpowers, there were, in fact, in the classical (Westphalian) international law sense only two (maybe three) sovereign states in the world, states with the power to declare and wage war. Turkey, Israel, Japan, Germany, the UK, Italy, and many others were no longer autonomous, even legally.

The major distinction of the argument in Arrighi and Silver is to place in historical context the limitations of the Westphalian system of international law, based upon the sovereign equality of states. This was reflected in the original Dutch system of hegemony, which prevailed from 1648 until the Napoleonic Wars. When British hegemony replaced the Dutch in the nineteenth century other states enjoyed only nominal independence at a time when British industrial and naval supremacy guaranteed a global *Pax Britannica*. Britain called into independence the Latin American states, but they remained under British economic tutelage until 1914. With the coming of American hegemony after 1945, even the semblance or fiction of the Westphalian system disappeared. However, since the 1970s there has been a radical bifurcation of military and financial global power. This has been most remarkable since the 1980s when the Reagan military buildup was financed through manipulation of interest rates on the dollar to siphon world liquidity into the United States.[46]

The difficulty with overwhelming US global military dominance at present rests in the transformation of its capital base. As long as the military production was financed from within the US the latter saw no security threat to itself. Once the finance to support these military structures has started to come from outside, the picture becomes more uncertain. American military power is accompanied by increased indebtedness of the American state to foreign capital seeking profit within the US, either on the private stock exchange or in government securities. This began in the 1970s, but it has become acute in the course of the 1990s. These concrete developments are central to the whole 'global financial expansion that in the 1980s and 1990s reflated the power of the U.S. state and capital and correspondingly deflated the power of the movements that had precipitated the crisis of US hegemony . . .'[47]

The US has become financially dependent upon its industrial protectorates, Germany and Japan, as well as upon Arab oil states and Chinese diaspora interests (Singapore, Hong Kong, and Taiwan). These entities may not be hostile to America, but they are not

necessarily committed to US political-military policies. At the same time they do have the economic power to limit American action, even if self-destructively. Besides, even now, the US does not have the military and political resources to constrain positively the direction of these states and city-states. This creates uncertainty in the US about how to behave towards its erstwhile protectorate-allies.[48] Todd sees here a fundamental weakness of the global order. The US lays sole claim to military dominance at a global level, but it is, in fact, neither financially nor militarily capable of ensuring the monopoly of the use of force which has to be, since Weber, the characteristic of legality in modernity.[49]

Another political contradiction of late capitalism concerns the relations between the US, its 'coalition', and the so-called developing world. Again, Arrighi and Silver have challenging insights into a true history of international law. These are completed by Harvey, with his theory of accumulation through dispossession. Capitalism has always been global, and always involved a huge transfer of value from the developing to the developed world. Dutch wealth was based upon the plunder of Spanish Indies gold and silver bullion. The exploitation of India, from the eighteenth century was utterly crucial to Great Britain's world hegemony. British power was further enhanced through the humiliation of China in the nineteenth-century Opium Wars which allowed the full realization of India's potential.[50]

The central thesis has to be that the so-called global order has always been and has never ceased to be based upon plunder. As Harvey puts it, the market-state will never produce a harmonious state in which everyone is better off. It will produce ever greater levels of social inequality. He argues that Marxism must not 'regulate accumulation based upon predation, fraud and violence to an "original stage" that is no longer considered relevant . . . A general re-evaluation of the continuous role and persistence of the predatory practices of "primitive" or "original" accumulation within the long historical geography of capital accumulation is, therefore, very much in order . . .'[51]

There is no longer even the pretence of a global project to integrate the formerly colonial world into a common world order. From the 1950s to the 1970s there was a project of development, Truman's 'Fair Deal,' although there was no real transfer of resources to the so-called developing countries. It appeared as if there was an American and even European postcolonial alternative to the subordinated and openly exploitative treatment of the non-Western world during the previous four centuries. Agriculture should have been the

basis of transfer of resources to a growing industrial base within developing countries, encouraging the strengthening of nation-state based economies. This process was to be supported by foreign investment and soft development finance, through the World Bank and IMF, which allowed a place for monetary policy to reduce unemployment and inflationary pressure. Nonetheless there was no Western acceptance of cross-society political alliances within developing countries. These were seen as 'extremist' and destabilizing in the context of the Cold War. They could only survive with Soviet support. They were caught up in the ideological conflict of the Cold War and subject to periodic Western military interventions, such as in Guatemala, the Dominican Republic, Chile, Vietnam, Angola, and many other instances. Consequently, there were the severest international political constraints standing in the way of assuring the widening of the purchasing power and consumer demand of non-Western societies.[52]

Even the neo-Keynesian development project was abandoned in the 1980s and replaced by a once again openly predatory transfer of capital resources from the developing countries to the West. This has covered suppression of natural resource prices, protection, and subsidization of the exports of Western agriculture, and simply the buying up and destruction of local industrial capacity, in the context of devaluation of assets and debt rescheduling. Market and opportunity mean simply removing any redistributive element from politics. Such redistributive politics are branded as 'extremist' or 'illusory.'

The crucial weapon/instrument in the implementation of these policies has been the US's control of the world currency, the dollar. Once again it is a direct link between the political impossibility of monetary reform and the continued pillage of the Third World – so vindicating Stiglitz's skeptical prognosis. As Will Hutton graphically explains, it was raw power that enabled the US to insist upon the dollar as the international unit of account in 1944. However, at the time, government policy was still Keynesian: to achieve income equality, employment, and economic stability. There was to be no devaluation of the dollar against gold, with full convertibility. Yet in the early 1970s the US imposed a world financial system in which the dollar would be the principal currency against which the others would float, but it accepted no obligations in managing its own currency. While the dollar fell, it had no rival currency and so the US was able to appropriate 80 per cent of the industrialized West's current surplus for its own strategic and military purposes. Without interest

rate ceilings or reserve requirements, American banks lending out of London could come to dominate global banking.[53]

The creation of a new world currency, managed by a world central bank – which Stiglitz suggested might be made out of expanded Special Drawing Rights managed by an IMF whose voting system was reformed – was out of the question for simple reasons of national interest. Reagan abandoned tax on dividends paid to foreign holders of American financial assets. By the end of the 1980s virtually every country had been forced to remove outward capital controls and, by 1999, virtually 80 per cent of the world's current account surplus had been won for the US. The structures for US deficit financing of its consumer boom and armaments program were in place. These developments 'have been the results of a series of consistent policy choices over thirty years reflecting essential US reflex dispositions towards unilateralism . . .'[54]

Such a stranglehold on credit has offered huge possibilities of enrichment. The increase in interest rates for the dollar in the 1980s not only ensured the inflow of capital to deficit-finance the arms race. It forced most Latin American economies with huge dollar debts into recession, to devaluation of their currencies and to debt-equity swaps that facilitated a general US buy-up of productive assets.[55] The same pattern was repeated with the Asian financial crisis of 1997, when the US picked up large sectors of Korean industry at knockdown prices, so that US dollar loans could be repaid. The dollar is used for 77 per cent of international loans and 83 per cent of foreign exchange transactions, as much as in 1945. Hutton warns this has not been irrational economic dogma: 'It was the dogma of the expanding superstate. The international financial system has been shaped to extend US financial and political power, not to promote the world public good . . .'[56] Hutton succinctly describes the global political deficit of the international financial system in social democratic terms. There is no equality of opportunity, nor an equitable sharing of risk. Nor is there a social contract for the redistribution of income, investment in social, physical and human capital.[57]

Harvey resorts to more familiar Marxist language. He insists that the fundamental drive to accumulation by dispossession is as old as capitalist imperialism itself. The crisis would not be happening 'if there had not emerged chronic problems of over accumulation of capital through expanded reproduction coupled with a political refusal to attempt any solution to these problems by internal reform . . .'[58] He describes the opportunities open to those who can manipulate

a monopoly of credit mechanisms in traditional Marxist terms. Monopoly control of credit systems allows unlimited possibilities to operate a credit squeeze, to drive a drying up of liquidity and to drive enterprises into bankruptcy.[59] Accumulation by dispossession allows the release of a set of assets (including labor power) at very low (and in some instances zero) cost. Over-accumulated capital can seize hold of such assets and immediately turn them to profitable use.[60] These 'money, money, everywhere' activities are as old as the hills.

> Some of the mechanisms of primitive accumulation that Marx emphasised have been fine-tuned to play an even stronger role now than in the past. The credit system and finance capital became, as Lenin, Hilferding, and Luxemburg all remarked at the beginning of the twentieth century, major levers of predation, fraud and thievery. The strong wave of financialization that set in after 1973 has been every bit as spectacular for its speculative and predatory style. Stock promotions, ponzi schemes, structured asset destruction through inflation, asset-stripping through mergers and acquisitions, and the promotion of levels of debt incumbency that reduce whole populations, even in the advanced capitalist countries, to debt peonage, to say nothing of corporate fraud and dispossession of assets (the raiding of pension funds and their decimation by stock and corporate collapses) by credit and stock manipulations – all of these are central features of what contemporary capitalism is about. The collapse of Enron dispossessed many workers of their livelihoods and their pension rights. But above all we have to look at the speculative raiding carried out by hedge funds and other major institutions of finance capital as the cutting edge of accumulation by dispossession in recent times . . .[61]

The Shaping of International Law Agendas

Law may refer to the command enforced by a sovereign state, the positivist's equation of law with the state. The word 'law' in 'international law' may refer more generally to the legal relations among equal and independent states according to the Westphalian system. Marxism can easily identify the first sense of 'law' as an instrument of 'the capitalists' who control the state. This is a very useful shorthand for the assumption of a rule-of-thumb political sociology that a state bureaucratic apparatus is effectively controlled by a clique or oligarchy in its own interests. The difficulty is understanding the relations between a dominant capitalist state and a whole range of other states in the international system. Concretely, this means asking how the US relates to the other major Western powers, including Japan, and, then, to what are loosely called the developing, or simply

significantly poorer countries, including China, India, Brazil, and innumerable other smaller countries. This chapter has relied upon an updated classical Marxist analysis of contemporary capitalist imperialism, which insists there is nothing new in the name of the so-called 'New Imperialism.' Now it will be asked whether international law can offer any autonomous prescriptions in response by delving also among the first Marxist theories of imperialism and the nation,[62] while considering specifically the quality and possibilities of US relations with other powers.

Arrighi and Silver consider most exhaustively the historical dimension of a series of capitalist hegemonies and identify the original structure of international law as attributable to the character of Dutch hegemony. 'When it was first established under Dutch hegemony, national sovereignty rested on a mutual recognition by European states of each other's juridical autonomy and territorial integrity (legal sovereignty), and on a balance of power among states that guaranteed their factual sovereignty against the attempts of any state to become so powerful as to dominate all the others . . .'[63]

After 1945, the British fiction of a balance of power that could still assure a factual sovereign equality of states was discarded even as a fiction. 'As Anthony Giddens has pointed out, US influence on shaping the new global order both under Wilson and under Roosevelt "represented an attempted incorporation of US constitutional prescriptions globally rather than a continuation of the balance of power doctrine . . ." '[64] In other words, while the symptoms of the present crisis in international law are clear to all, the nature of recent developments in US policy with respect to international law is seriously misunderstood. It is not now that the Westphalian model of international law is being challenged. This was buried, at the latest, with the onset of the Second World War, perhaps even with the Treaty of Versailles. The US has never in the twentieth century accepted that the constitution of a state was an internal matter. The export of its own constitutional model was the object of two world wars. The semi-sovereign German and Japanese protectorates were its models for the organization of world society. There was no dissent from this in the West.

It is mistaken to claim that it is now, for instance, that the UN Charter is being ignored or the equality of states is being denied. There is not a present and unprecedented American overthrow of international norms. The American project of international society, at least since 1945 (and in terms of its war aims), was always quite different from classical international law. It was the export of its

constitutional model of market democracy against the totalitarian socialism of the Soviet Union and China. By the early 1950s it had locked the whole planet into a coalition to this end. The difference now is that the changing underlying economic structures of international society mean that the US does not have the material resources to be assured of its ability to enforce its project against possible new foes, nor can it rely any longer upon its economically resurgent erstwhile Allies. This leads it to change from acting as a hegemonic power which continues to enjoy international legitimacy, to becoming a power which, clearly since its invasion of Iraq in the spring of 2003, tries to rely exclusively on its own political and military strength to force through its will.

The main preoccupation of the international law agenda of the US, here acting alone except for British support, has been to develop doctrines of pre-emptive attack, armed intervention, the spreading of military bases through agreement with host states, and the global strengthening of military policing against terrorism. This agenda now dominates the international scene. There are US military protectorates in Afghanistan and Iraq. Others may be in the offing for North Korea, Iran, and Syria. While there is less enthusiasm for intervention in Africa and Latin America, further protectorates, or very large measures of military assistance and co-operation, are in place or are likely at least, in Sierra Leone, Colombia, the Congo, and Liberia. The underlying principle of both US and British policy is that such states are not sovereign and equal members of international society. Hence, the US undertakes international military actions, first without troubling to find the consent of the UN and, second, without even looking to have the support of NATO. In Kosovo, Afghanistan, and Iraq the US has waged wars which are all in contravention of the basic international norms of sovereign equality of states and of the elementary need for community authority to legitimate the exercise of force against individual members of the society of states.

The question is how to explain this, and also whether any constructive response is possible. Writing in 1999 Arrighi and Silver did not consider that serious conflict between the US, its erstwhile Western allies, and the significant Pacific Rim states was inevitable, despite the bifurcation of military and financial global power, provided there is not 'US resistance to the loss of power, and prestige (though not necessarily of wealth and welfare) that the recentering of the global economy on East Asia entails . . .'[65] Capitalism is a global phenomenon. Even China has long embarked upon a process of

primitive accumulation, which Harvey characterizes as an internally imposed accumulation by dispossession, comparable to the Tudor enclosures.[66] Todd also acknowledges that advanced capitalism affects social structures, democracy and the rule of law in all major Western societies, including France.[67] Probably, insofar as Hardt and Negri's work draws (eclectically, of course) on Marxism, it also clearly fits into this picture.

An early Marxist theory of 'ultra-imperialism' at the beginning of the twentieth century proposed that a peaceful adjustment of the relations of production (including international relations) to the world-wide forces of production was possible. Karl Kautsky thought this adjustment could be brought about by capitalism itself. Capitalism would go through an additional state, which would see an aggrandizement of the policy of cartels into a foreign policy. 'This phase of ultra- or super-imperialism involving the union of imperialists across the globe would bring to an end their struggles with one another. The notion, in other words, of a co-operative effort in the Grotian tradition enabling a joint exploitation of the world by internationally merged finance capital . . .'[68]

However, writing at the end of 2002 and in the late spring of 2003 respectively, Todd and Harvey consider present US foreign and consequently international law policy do indicate a very firm intention to resist any loss of power and prestige. The US is evidently willing to accept open conflict with other powers. For both authors, American actions are necessitated by the internal contradictions of its political-military and economic-social relations, above all, with its allies. Political relations with its' allies have broken down because this is the wish of the US. Political and military will have to be asserted to compensate for economic and social weakness within the US. Economic structures shape the agenda of contemporary international law in the following respects. Most importantly, the US realises that its economic pre-eminence in the global system is seriously threatened in the medium term. Its economic dependence on its Western allies, particularly Japan and the European Union, means that it feels compelled to choose issues on which to exercise its political power in a primarily coercive military dimension in order to force an acknowledgement of its supremacy.[69]

This is where the exact nature of the evidence Todd and Harvey adduce to arraign the US is interesting. Presumably the poststructuralist view of the global penetration of 'capital discourse' means that it is impossible to speak of independent agency in international

relations. In this sense the US does not exist as an entity, and, *ipso facto*, can hardly have a plan of world domination. The US is deconstructed as having no essence prior to international society. Intentionality is a mere effect of discourse and not a cause in its own right. Following Saussure's linguistic structuralism, meaning stems from relations of difference between words rather than reference to the world, in this case the consciousness of individuals.[70] Todd's French discourse of critique of the US is, perhaps, embedded in relations of French hostility to the US which may be traced back to Roosevelt's treatment of de Gaulle in North Africa in the winter of 1942–43. That opposition itself may be traced back into the mists of time. Wittgenstein has called 'mentalism' the belief that subjective mental states cause actions. Instead, we merely ascribe motives in terms of public criteria which make behavior intelligible. Therefore, it is better for social scientists to eschew intentions as causes of actions and focus on the structures of shared knowledge which give them content.[71] This would place Todd firmly within a huge literary industry of French anti-Americanism.

Capitalism is a discourse that produces resistances, because it has to strive to absorb and exclude its 'other,' whatever is not capitalist. Harvey has no difficulty with using postmodern political theory to describe the workings of capitalism.[72] Capitalism can be said necessarily to create its own 'other.' It can make use of some non-capitalist formation or it can actively manufacture its 'other.' There is an organic relation between expanded reproduction and the often violent processes of dispossession that have shaped the historical geography of capitalism. This forms the heart of his central argument about accumulation by dispossession.[73] However, Harvey objects to placing all struggles against dispossession 'under some homogenising banner like that of Hardt and Negri's "multitude" that will magically rise up to inherit the earth . . .'[74] Wendt makes a similar objection to poststructuralism, or what he calls wholism in social theory. He argues that no matter how much the meaning of an individual's thought is socially constituted, all that matters for explaining his behavior is how matters seem to him. In any case, what is the mechanism by which culture moves a person's body, if not through the mind or the self. 'A purely constitutive analysis of intentionality is inherently static, giving us no sense of how agents and structures interact through time . . .'[75] Individuals have minds in virtue of independent brains and exist partially in virtue of their own thoughts. These give the self an 'auto-genetic' quality, and are the basis for what

Mead calls the 'I,' an agent's sense of itself as a distinct locus of thought, choice and activity 'Without this self-constituting substrate, culture would have no raw material to exert its constitutive effects upon, nor could agents resist those effects . . .'[76]

So the vital distinction that the historian *has to struggle to make* is between the following two styles of argument. Wittgensteinians say that, in the hypothetical court case, the jury can only judge the guilt of the defendant – having no direct access to his mind – through social rules of thumb to infer his motives from the situation (a history of conflict with the victim, something linking him to the crime scene, etc.). They go further and argue that the defendant's motives cannot be known apart from these rules of thumb and so there is no reason to treat the former as springs of action in the first place.[77] At the same time, many now distinguish between two kinds of mental content. 'Narrow' content refers to the meanings of actions in a person's head which motivate his actions, while 'broad' content refers to the shared meanings which make the actions intelligible to others.[78] While Wendt draws these distinctions from the philosophy of agency and structure, they are always perfectly familiar to historians. The difficulties of contemporary history are what face the polemics of Todd and Harvey. They have relatively little access to the primary archives, whether official or private, that would satisfy the most rigorous historian, but the value of knowledge is also relative to the circumstances in which it is constructed, whether individually or socially.

Todd's argument is, very much like Wittgensteinian public criteria, based on an analysis of the material situation of the US and the material consequences of its actions. The US is no longer necessary for the maintenance of 'freedom,' democracy, and the rule of law in the world, given the disappearance of the 'socialist world.' The country has, since the 1970s and especially since 1995–2000, seen its economic situation radically altered to its disadvantage – the world's largest debtor, and significantly less productive than its main trade rivals. The same US embarks upon apparently ludicrous military adventures against extremely weak third world countries and penetrates into the Central Asian landmass under the pretext of pursuing a terrorism that it equates with the Arab-Muslim region, despite the limited pull of militant Islam outside Pakistan and Saudi Arabia. It acquires bases in several former Soviet Central Asian republics, Afghanistan, and, eventually Iraq (Todd is writing in December 2002), all through unilateral action, without consulting NATO or the United Nations. A centrepiece of this policy is to block any settlement of the Palestinian–Israeli

conflict and to keep the European Union marginal to a mediation of the conflict.

Europe, Japan, China, and Russia have no immediate interest to quarrel with one another and especially no economic interest to confront the Arab and Muslim world. They have every assurance that energy will be supplied because the Arabs and Iran need that for their own development. At the same time Israel's quarrel with the Palestinians is a serious source of conflict of interest for all of America's traditional Allies. It could weaken or complicate their relations with the source of an essential energy supply. So the assertion of unqualified US solidarity with Israel fits together with a plan to maintain a literally physical control of the oil resources of the Middle East. It enables the US to view with equanimity the possible destabilization of the source of its Allies' oil supplies through a generalized Arab-Muslim hostility towards 'the West.'[79]

The kernel of Todd's structural argument is that the US is behaving irrationally because both its internal and international situation have become unstable. It is fixated on the unilateral use of force to ensure control of territory and oil in the Middle East and Central Asia as a way of maintaining dominance over its erstwhile Allies. In this context Westphalian and UN Charter rules of international law do not apply to the US's relations with the Middle East and Central Asia. Doctrines of pre-emptive strike against terrorist states, or humanitarian intervention against brutal dictatorships, can be variously used and are being used to underpin a volatile Western–Middle Eastern relationship. The balancing of Israeli and Palestinian rights to self-determination is not important compared to keeping the European Union marginal to the political relations of the Middle East.

Writing in the spring of 2003, Harvey possesses the fact that the war with Iraq is in full swing. He agrees with Todd that the starting point of US action is its increasingly serious economic weakness. His argument has a classical Marxist framework, considering the options between a Kautsky style 'ultra-imperialism' of the Western powers and Lenin's scenario of a violent competition among the imperialist powers – meaning, effectively, all powers, including China.[80] He is also influenced by the tradition of geopolitics of the 1900s of Halford Mackinder, which treats control of the Eurasian landmass as central to world domination. However, beyond that Harvey relies primarily on an 'intentionalist' explanation of US policy. He refers to planning documents of US leaders, which are openly available, and also the writings of influential opinion leaders within the US. These are not

the equivalent of open access to the minutes of meetings of key decision-makers, but they suppose that access to US elite intentions is possible. At the same time, these elites are, for the moment, able to direct the course of US power.[81]

Harvey consider that both intentions and actions (e.g. the defense strategy documents of 1991–2 and the language justifying the invasion of Iraq) show a clear opinion for a military solution to the weakness of the US. Alliances and traditional international law are to be discarded in favor of unilateral and military action, in US interests. These actions are to demonstrate the absolute military and political supremacy of the country globally. Territorial and physical control of Middle East oil is sufficient for the US to maintain its dominance for the near future.[82] As Harvey puts it, 'if it ([United States]) can move on (as seems possible) from Iraq to Iran and consolidate its position in Turkey and Uzbekistan as a strategic presence in relation to Caspian basin oil reserves (which the Chinese are desperately trying to butt into), then the US, through firm control of the global oil spigot, might hope to keep effective control over the global economy and secure its own dominance for the next fifty years . . .'[83]

All of this dramatic confrontational strategy is understandable given the immense danger that the present international economic situation poses for the US. The constructive alternative would be for the US to turn away from imperialism and engage in both a massive redistribution of wealth within its borders and a redistribution of capital flows into the production and renewal of physical and social infrastructures. This would mean an internal reorganization of class power relations and transformation of social relations that the US has refused to consider since the Civil War. More deficit financing, much higher taxation, and strong state direction are what dominant class forces within the US will not even consider.[84] At the same time, the economic, particularly financial threat from East Asia is huge. Arrighi and Silver think the immediate major task for the US is to accommodate itself to this constructively. Harvey thinks that, on balance, the US is unlikely to take this course. The ferocity of the primitive capital accumulation that is taking place in China may well spark a rate of economic growth there capable of absorbing much of the world's capital surplus. There may be revolution and political breakdown in China caused by the stress of present social change. However, if there is not, 'the drawing off of surplus capital into China will be calamitous for the US economy which feeds off capital inflows to support its own unproductive consumption, both in the military and in the

private sector . . . In such a situation, the US would be sorely tempted to use its power over oil to hold back China, sparking a geopolitical conflict at the very minimum in Central Asia and perhaps spreading into a more global conflict . . .'[85]

The Leninist scenario of violent competition among capitalist blocs is most likely. The more explicit the US project becomes, the more it will almost certainly force an alliance between France, Germany, Russia, and China, which more reflective American figures such as Kissinger believe will not necessarily lose in a struggle with the US.[86] Arguing from within social democratic parameters, Hutton and Todd hope that the European Union can balance the economic power of the US more peacefully. The key instrument is the aggressive use of the Euro as a political weapon, to enforce European social policies both within the European economic area and in international development aid policy.[87] However, Harvey insists that such a project cannot hope to be realistic unless it involves an explicit rejection of neoliberal economic policy, which indeed both Todd and Hutton would also advocate. There must be a strong revival of sustained accumulation through expanded reproduction (read: curbing the speculative powers of finance capital, decentralizing and controlling monopolies and significant redistribution of wealth). Otherwise this Kautsky-style benevolent 'New Deal' imperialism can only sink deeper into the quagmire of a politics of accumulation by dispossession throughout the world in order to keep the motor of accumulation from stalling.[88]

Contemporary US policy, which for the moment enjoys British support, appears nihilistic in relation to the existing Westphalian international legal order, making it a pure fiction. It appears at the same time, consciously, but completely unrealistically, to be a project to restore political control of large parts of the non-Western world which was temporarily relinquished in the 1950s and the 1960s. There is much argument that the granting of independence was premature and that it has to be undone because there are simply not adequate political institutions, viz. state structures in large parts of the globe.[89] Again, as with the present US treatment of its erstwhile Allies, this apparently radical suspension of traditional Westphalian and UN Charter law in relation to large parts of the South has to be seen in its longer historical context. It is, in terms of time-scale, merely a phase in the development of international law since the sixteenth century. Arrighi and Silver have most brilliantly captured this phase as one of a crisis of US capitalist hegemony. They give full place to changing developments in the history of international law since Dutch

hegemony ushered in the Westphalian system. The League of Nations and the United Nations mark the transition from British to American hegemony. The latter's hegemony is now fundamentally in question. The US attempt to reverse the course of history, to reintroduce colonial-type international protectorates, is another aspect of the nihilism that will simply not face the responsibilities of global management in terms of necessary economic and social change.

Optimistic European voices argue that a reassertion of an economic balance of power, among Europe, Russia, Japan, China, etc. and the US (possibly eventually India and Brazil) make inevitable a return to the dialectics of dialogue in the resolution of international conflict. This supposes that the Americans can adjust to a reduced but still significant role in the international economy. In relation to the South, this optimistic Europeanism argues that European, Japanese, and Chinese capitalism is more socially oriented than the predatory Anglo-American neoliberal market economy states. Unlike the US and UK they can negotiate compromise relations with different cultures, premised upon a slow process of gradualist reform and integration. Concretely, this means Europe absorbing Russia and the Middle East into its economic-social zone, in which a postmodern, agnostic absence of the military dimension to politics will prevail. Arguably Japan and China can take the same lead in East Asia. In this picture the US goes off into the wilderness from which it emerged at the beginning of the twentieth century. It is left with NAFTA. Todd and Hutton, from England and France, place much of hope in developments in such directions. They can point to the failure of neoliberalism to make decisive breakthroughs in France and Germany, not to mention reversals of economic strategy in Putin's Russia and, finally, the great enigma of China.

None of this optimism can be grounded in the rather more Leninist imperialist scenario outlined by Harvey. The concrete flaw in European optimism is that the US is aware of its strategic precariousness and has already moved to anticipate it. It enjoys a political military precedence if not dominance, which can impede any alternative global project. Japanese, other East Asia, and European capital are locked into the radically skewed American capital market as part of capital's natural search for maximum profit. European and East Asian industrial production are equally locked in the embrace of this market. The latter is not only skewed but also twisted, since an integral part of the consuming power of this market is the surplus capital of the exporters to America.

On the outside stands the economically marginal, disenfranchised world proletariat, threatening, or being seen to threaten, illegal immigration, international crime (especially people and drug trafficking) and, of course, terrorism. Marxism would surely require that this proletariat must become more radical as it becomes more economically marginal. The latter must happen because of the continuing transfer of capital resources from the South to the North, an uninterrupted process since the sixteenth century. The will and the means do not really exist in the West (Europe and Japan will not go along with the US) to restore political control over the South. So the disorder it represents will gradually engulf the West. That is, unless a social democratic alternative – whether or not dubbed Kautsky-style 'ultra-imperialism' – can support a true development of the same social-democratic model, a substantive economic self-determination of peoples in the developing world.[90] However, Marxist analyses of the impact of international political economy upon the general structure of international law remain the most convincing for the present.

Notes

1 M. Hardt and A. Negri, *Empire* (2000).
2 The term *molecular* is taken from D. Harvey, *The New Imperialism* (2003) 29–32.
3 P. Bobbitt, *The Shield of Achilles: War and Peace and the Course of History* (2002) xxxii.
4 In his contribution to M. Byers and G. Nolte, *The United States Hegemony and the Foundations of International Law* (2003) 98.
5 O. Bennett, *Cultural Pessimism, Narratives of Decline in the Post-Modern World* (2001) 146.
6 Ibid., 153–4.
7 Ibid., 160–1.
8 Ibid., 170–2.
9 Ibid., 162, 190.
10 Ibid., 61–5.
11 Ibid., 65–75.
12 A. Callinicos, *Against Postmodernism* (1989) 82.
13 Bennett, *Cultural Pessimism*, 16.
14 Callinicos, *Against Postmodernism*, 84–6.
15 Hardt and Negri, *Empire*, 31.
16 Ibid., 32.
17 Ibid., 34.
18 Ibid., 95.
19 Ibid., 97.

20 Ibid., 103.
21 Ibid., 106.
22 Ibid., 161–7.
23 Ibid., 246.
24 Ibid., 247.
25 Ibid., 266.
26 Ibid., 283–4.
27 Ibid., 308.
28 Ibid., 309–10.
29 Ibid., 336.
30 Ibid., 363.
31 Ibid., 384.
32 Ibid., 413.
33 J. Stiglitz, *Globalization and its Discontents* (2002).
34 Ibid., 223–8.
35 Ibid., 65–7.
36 Ibid., again 223–8.
37 Ibid., 237.
38 Ibid., 238–48.
39 E. Todd, *Weltmacht, USA Ein Nachruf* (2003) 95, referring to the taboo character surrounding discussion of shrinking demand among economists considering globalization. The only exception he can find is Chalmers Johnson, *Ein Imperium verfaellt, Wann endet das Amerikanische Jahrhundert?* (2000) 252.
40 G. Arrighi and B. J. Silver (eds), *Chaos and Governance in the Modern World System* (1999), generally, and especially Chapter 1, 'Geopolitics and High Finance,' 37–96.
41 Todd, in *Weltmacht USA*, identifies this feature of advanced capitalism as affecting equally all the so-called Western democracies. In particular France and Great Britain are governed by remote oligarchies that preside over increasingly polarized societies, 32–6.
42 The least disputable aspect of this argument: see Arrighi and Silver, *Chaos*, 284, Harvey, *New Imperialism*, 128–9; Todd, *Weltmacht USA*, 117–19.
43 Arrighi and Silver, *Chaos*, 137, 147.
44 Harvey, *New Imperialism*, 48–9.
45 Todd, *Weltmacht USA*, 115–16.
46 Arrighi and Silver, *Chaos*, 88–96, 284.
47 Ibid., 284.
48 An identical argument by Todd, *Weltmacht USA*, who points to the particular role of Germany and Japan as subordinate powers, suffering huge military bases which they finance indirectly, 110–11.
49 Ibid., 119.
50 Arrighi and Silver, *Chaos*, 219–46.

51 Harvey, *The New Imperialism*, 144.
52 Arrighi and Silver, *Chaos*, 205–11.
53 W. Hutton, *The World We Are In* (2001), 234–9.
54 Ibid., 240–2, esp. 242. Also Harvey, *The New Imperialism*, 127–32, 'The Powers of Mediating Institutions.'
55 Ibid., 243–5.
56 Ibid., 247–51, esp. 251. Also Harvey, *The New Imperialism*, 137–82, 'Accumulation by Dispossession.'
57 Ibid., 247.
58 Harvey, *The New Imperialism*, 181.
59 Ibid., 155.
60 Ibid., 149.
61 Ibid., 147.
62 V. Kubalkova and A. Cruickshank, *Marxism and International Relations* (1989). One could give weight to Soviet or Chinese doctrines of international law, or also the whole range of other post-1945 Marxist theories of international relations, but the turn of the millennium, remarkably, allows focus on issues in a manner similar to the immediate pre-1914 period, i.e. where there is a crisis of hegemony, this time of the United States, while earlier, of Great Britain.
63 Arrighi and Sliver, *Chaos*, 92.
64 Ibid., 93. See most extensively, P. Bobbitt, *The Shield of Achilles: War and Peace and the Course of History* (2002).
65 Ibid., 270. They see a balance of power in East Asia as possible.
66 Harvey, *The New Imperialism*, 153–4.
67 Todd, *Weltmacht USA*, 32–6.
68 Kubalkova and Cruickshank, *Marxism and International Relations*, 52. This assumption underlies my contribution to A. Qureshi, *Perspectives in International Economic Law* (2002), 'The National as a Meta-Concept of International Economic Law,' 65.
69 This is the clear overall argument of both their books.
70 A Wendt, *Social Theory of International Politics* (1999), 178.
71 Ibid., 179.
72 See, for instance, D. Harvey, *The Condition of Postmodernity* (1989), which explains the break from fixed to floating currencies as marking the end of the balance between organized labour, large corporate capital and the nation-state, and which Bennett highlights as a watershed in the spread of modern cultural pessimism, *Cultural Pessimism*, 146.
73 Harvey, *The New Imperialism*, 141–2.
74 Ibid., 169.
75 Wendt, *Social Theory of International Politics* 180–1.
76 Ibid., 181–2.
77 Ibid., 179.
78 Ibid., 181.

79 Todd, *Weltmacht USA*, 36–8, 56–8, 146–54, 164–82.
80 Harvey, *The New Imperialism*, 75, 209, see also, more generally Kubalkova and Cruickshank, *Marxism and International Relations*, 52–3, that the development of capitalism is so uneven that conflict is inevitable.
81 Ibid., 18–25, 74–86, 183–212.
82 Ibid., 19.
83 Ibid., 78.
84 Ibid., 75–6.
85 Ibid., 208–9.
86 Ibid., 200.
87 Todd, *Weltmacht USA*, 211–38; Hutton, *The World We Are In*, esp. 400–11.
88 Harvey, *The New Imperialism*, 211–12.
89 This is argued most forcefully by such British figures as R. Cooper ('The New Imperialism', *The Observer*, April 7, 2002), a Blair advisor, and Niall Ferguson, a historian of the British empire and international economic and financial history.
90 As the author has already suggested, particularly in 'The National as a Meta-Concept of International Economic Law', in Qureshi (ed.) *Perspectives in International Economic Law*; and in A. Carty, 'Liberal Rhetoric and the Democratisation of the World Economy,' in *Ethics* (1988), 65.

7

RESISTANCES TO THE NEOLIBERAL INTERNATIONAL ECONOMIC ORDER

Diagnosis of the Relationship of Hegemonic Capitalism to Democracy, the Rule of Law and Human Rights

Coercive international order, cosmopolitan values, and economic interest

Given a picture of contemporary international society, which is dominated by the US, whose central significance for a philosophy of international law has been presented in the last two chapters, the question arises how to understand the same subject as it is presented by contemporary American scholars, both lawyers and political philosophers. Such authors as Allen Buchanan and David Golove,[1] Fernando Teson,[2] and, of course, John Rawls himself,[3] present a closely reasoned agenda for what they call the democratization of international society, setting out conditions for the legitimacy of states, which are marked by human rights standards that can themselves trigger grounds for forceful intervention by other states. The central point of these reflections on the need for a morality of international law is that a critical reflection is made of the state's claim to legitimacy in international law by virtue of the mere fact of control. As Buchanan and Golove put it, 'according to some normative views, including Rawls's in the *Law of Peoples*, only those states that meet the requirements of transnational justice, understood as respect for individual rights, are entitled to enjoy the rights and privileges of members of good standing of the international community.'[4] There are nuances in these debate as to whether so-called illiberal regimes should be tolerated, or whether pragmatic considerations should weigh against democratic regimes declaring war on authoritarian regimes.[5] There is no doubt that this school of thinking is very pertinent and stimulating for international law. It is probably based upon the single critical charge that it is not enough to assume, as traditional international law does, that officials and regimes of states are representative simply

because they are in effective control.[6] Rawls himself puts it very clearly. He distinguishes international law from a 'law of peoples' which is a family of political concepts, including principles of law, of justice and of the common good, all of which stem from a liberal concept of justice which is to be applied to international law. [7] This is not a blank check to use force against non-democratic, non-liberal, or whatever, states, but it does mean that the only constraint is one of prudence, not law. So Teson says, quite frankly, 'Even in cases where the regime is overtly tyrannical (as in present-day China) waging war would be wrong because of the impossibility or prohibitive cost of victory.'[8] Teson's conclusion is that 'the relationship between liberal and illiberal states can only be a peaceful *modus vivendi* and not a community of shared moral beliefs and political commonalities.'[9]

These Americans' reflections on a need for a morality of international law are impossible for classical international law, with its doctrine of effectiveness, to resist intellectually. Nevertheless, the American views are curiously unearthed and utopian in the sense that its liberal ideology is both unreflective[10] and, at the same time, not politically or socially situated. The next stage of our argument is to show how the coercive rhetoric of universal democracy and the rule of law actually function on the international stage. The language of human rights is essential to the oversimplification of the roots of disorder in international society at present. Problems of disorder are attributable to terrorist regimes that 'kill their own people' and threaten all others. Yet for Western understanding the two essential elements of human rights are unrestrained freedom and the inability or unwillingness to engage in rational debate. These necessitate a violent response to fears of international disorder. The legalization of this language is essential to legitimize the recourse to organized state-level violence on the international plane. The underlying interests that this violence serves, legitimized by human rights rhetoric, are those of Western consumer society, a materialist-hedonist culture that requires a militarized control of the planet to ensure its continued expansion. A rapacious, subjectivist individualism is the anthropological foundation for the consumerist market economy that asserts itself globally through rhetoric about human rights and liberal democracy. Legalized, that is enforceable, human rights furnish the legitimizing rhetoric of an international legal order that resorts increasingly to humanitarian intervention and asserts the right of pre-emptive attack against governments, which threaten others through terrorism 'against their own people' and against their

neighbors. In other words, the legalization of human rights at present is crucial to transferring guilt for the problems of international disorder outside Western societies and legitimizing violence against non-Western societies. The language of human rights is the ultimate form of disempowerment the West uses to address its victims. A critique of the employment of the language of universal human rights, culminating in a right of humanitarian intervention, needs to focus not simply on the details of these concepts but also on the absences that they imply with respect to the rest of international law. Taken together, can they be regarded as constituting a legal system or order? In terms of the analytical approach to law the answer can only be positive, but in terms of a wider 'political teleology' it cannot be.

A Social democratic order is the alternative to civil war whether at a national or an international level. [11] Increasing numbers of the states of the non-Western world are torn by unresolved socio-economic conflict. This expresses itself in essentially class-based ethnic division, reversion from secular nationalist ideology to religious fundamentalism, terrorism, and massive waves of cross-border migration. The privatized Western concept of a legal order offers a monocultural explanation of this state disorder in terms of inefficient, corrupt, and authoritarian state structures in *foreign* countries, with the subtext that it is not the function of the state to resolve internal social tensions through the redistribution of economic resources. The most significant dimension of the Western transformation of the international legal order from the 1960s through the 1980s to the present is to change the focus from the social dimension of international development to the political-military dimension of combating terrorist threats of violence and international crime.

A central focus of Western international law scholarship is now on making human rights law effective, eventually through humanitarian intervention and the forceful spread of the right to democracy. There is an increasing development of so-called rapid reaction military forces that should be able to intervene in countries tom by civil war and plagued by 'vicious dictatorships', etc. This use of force is ostensibly to defend human rights, but in practice it means responding to the consequences of international political and economic chaos exclusively through the use of violence. It is hardly surprising that so-called humanitarian intervention as a principal measure to resolve internal conflict or to spread democracy becomes entangled with informal Western state intervention through the use of mercenaries. The line between formal and informal intervention (state and private) becomes

fuzzy as the line between a 'regular' and 'black' (mafia, terrorist, drug or other crime-driven) economy in Western economic relations with non-Western states.[12] This fuzziness is again an inevitable consequence of the absence of an international public morality.

Non-Western states now find themselves increasingly compelled to assent, through treaties of cooperation, to measures to counter international criminal activity, whether in the export of drugs, dirty money, or population flows. These agreements will frequently include forms of military assistance in terms of Western bases and equipment. The primary and readily applied sanction for non-cooperation is economic boycott and embargo. The ultimate sanction for non-cooperation remains military/humanitarian intervention. However, the distinction between economic and military sanction is not fundamental. The coercive character of this imposed legal acquiescence by non-Western countries comes from its overall objective. It ignores the overall basic function of civil-political society that is to replace civil war (and even criminal violence) with freely agreed measures for overcoming social inequalities and achieving class peace. Instead, the measures of economic and military sanction are defensive, a re-establishment of control over non-Western state territory in the interests of Western security.

Closer attention needs to be paid to the notion of imposed legal acquiescence. It is a concept essential to but not explicitly developed in analytical jurisprudence. Hart explains that for a legal system to exist, it is only necessary for the majority to accept, to acquiesce passively in the system. How the officials, who internalize the rules and the others who acquiesce, are distinguished or identified is left open.[13] The so-called consensus upon which international law rests includes the crucial legal legitimization of economic coercion. This is clearly illustrated by the legislative history of the Vienna Convention on the Law of Treaties. Again, it was the Western countries that managed to repel the argument that economic coercion or pressure could constitute a violence that vitiated consent to an agreement. Only a threat or use of military force against a state was excluded. Overwhelming economic pressure would always be permissible.[14]

Economic hegemony, at the global level, means that the pressure of combined individual Western wishes and desires expresses itself in an overwhelming form on the rest of the world. The background to these wishes and desires is a methodological individualism that insists that each individual's claims and desires have automatic legitimacy and can compel fulfillment through whatever level of pressure

is necessary. This value-subjective, morally anarchic philosophy is the essential anthropological basis for the free market economy. It supposes that human demands are not subject to external criticism and the success of these demands depends entirely on the strength with which they are pressed forward.

These reflections have remained diagnostic. My argument, to be developed, is that human rights discourse has to be seen as embedded in a coercive international legal order, where the idea of law is itself, as a matter of self-understanding of Western culture, violent. This legal culture rests upon a vision of voluntarist individualism that is morally agnostic and makes recourse to violence, i.e. law as sanction, unproblematic. It should be within this wider context that the recourse to the language of human rights enforcement, culminating in humanitarian intervention, is seen and understood.

To find an alternative theory of law and society, one might begin from such ideas as that human beings come before law, as understood by the analytical school; that they have rights is a way of saying that they exist; that human beings can distinguish between what is true and false, what is good and evil. Therefore, they can share these forms of knowledge, dialogue with one another, cooperate and avoid war. Law is, then, the product of freely reached consent in communities and across communities. No one may command if it is not in virtue of a delegation from those who dispose of themselves freely, in order to obey freely, what are reasonably given orders. Political power implies always an interpersonal relationship of recognition and reciprocity, mediated institutionally through a judicial assessment of the quality of these human relations.[15]

Radical individualism of 'Western human rights,' whether Hobbesean or postmodern

The word phagocyte refers to a type of body or cell that engulfs bacteria, etc. In his polemic *The Hidden Face of the United Nations* (in French) 2000 Michel Schooyans borrows this word from Solzhenitsyn's famous Harvard Lecture (1978) to describe the tendency present in our society for law to appropriate morality. This may seem surprising in the face of the liberalization of Western society from traditional, especially Christian values, in the 1960s and the 1970s. The state withdrew from wide areas of personal life no longer regarded as of public interest. However, Schooyans points sharply to a sting in the tail of this liberalization, which he connects with the

concept of an international legal order that takes coercion/sanction as its lynchpin.

The Western (i.e. European-North American) concept of the person, the subject of human rights, is radically voluntarist. It is based upon the unrestrained will of the individual in a radically subjectivist environment. There is no framework of rational discussion that can resolve differences and the tendency is increasingly towards a manipulation of assent through interest groups that reflect economic and military interests. The outcome is a forced consensus. Since human rights cannot be based upon objective understanding of either the value of the person or of reason, the consensus needed to reach decisions in democracies is increasingly the subject of coercive manipulation (popularly known as *spin*) causing alienation and withdrawal from the political process.

The critique of voluntarism is that where each is free to choose his truth and act according to conscience, where all human beings are only individuals and have no common nature, or naturally grounded sociability, the meaning of words such as law, person, morality, family, nation, etc. depends upon consensual definitions which each one of us pleases to give.[16] Since there is no necessary element of reason in assent, it means simply adherence to a decision, without any necessary rapport with the truth of what is agreed. Consensus means acquiescence given to a project, a decision not to oppose it.[17]

Since we do not agree on any absolute values everything in the way of legitimacy, and presumably also the so-called rule of law, rests upon agreement about procedure, the process of consultation that precedes decision. The Habermasian theory of a free communicative space is explicitly based upon a post-metaphysical rejection of natural law, but fairness in communication is not enough to found norms and values. It is politically agnostic about the actual context in which communication takes place.[18] In fact, it is essential to trace exactly the processes whereby individuals reach consensus in self-styled liberal democratic Western states. If there is no acceptance that there can be rationally objective ways of resolving differences of opinion about what is good or bad, it is inevitable that an anarchy of affirmations will, in fact, be resolved through the pressure, if necessary violent, of a preponderance of voices. It is here that voluntarist individualism fits so well with the market economy. Exchange value dominates over nostalgia for use-value to mean that there are no values in common, but instead an individualist competitive struggle in the market as a place of exchange. The ultimate logic here is not a recognition of the

absolute equality in dignity of all human beings, but the elimination of the inefficient, whether the individual or the nation. It is the frequency, density, and intensity of desire that is expressed in the multiplicity of choice that comes to dominate. Whatever holds out is legitimate.[19]

This is still a very elementary account of the relationship between liberalism, whether in its 'modernist' or 'postmodem' variety, the violence of the market, and the rhetoric of human rights as liberal democracy and the rule of law. Baudrillard also argues that the practice of politics and the practice of economics have increasingly converged to become the same type of discourse. The freedom to think is the freedom to consume. At the root of this transformation is the annihilation of all finality in the contents of production.[20] Work reproduces itself and consumes itself like anything else. It exchanges itself with non-work in a complete equivalence of exchanges. There is no eschatology that might found itself on the social.

The roots of political passivity are here. Public opinion is itself a commodity. Opinion polls exist somewhere beyond any social production of opinion. They rebound incessantly in their own images: the representation of the masses is merely a simulation, as the response to a referendum (the father of opinion polls) is always induced by the question. It is not a matter of a single person *producing* an opinion; rather everyone has to *reproduce* public opinion, in the sense that all opinions are swallowed up in a general average, and then reappear at the level of individual choice. For opinion, as for material goods, production is dead, long live reproduction. Let spin be born.[21]

National practices of manipulation and manufacture of consensus *are the democratic process*. Since one opinion can only be as good as another and we must all tolerate one another's difference, it is inevitable that those with less capacity to resist the opinions of the stronger will have to submit to the latter. The weaker parties recognize that they have to behave as the majority of the group have the habit of doing. Law comes in to express the conclusion of this process because the consensus reached can be sustained and effective only if it is subsequently legitimate to enforce it against those who are recalcitrant. The presence of these tendencies in the international community could hardly be clearer at the moment. Human rights rhetoric (liberal democracy/market economy/rule of law) is made into a fundamental law of international society, violation of which places the dissenters outside international society. Undemocratic societies constitute a threat to the security of their own members and to the rest

of 'law-abiding' international society. They warrant the suspension of the law relating to the use of force in relation to them. At least one difficulty of this approach is that the 'legal' analysis of and solution to a supposed problem is, above all, military and only secondarily political, economic, and social.[22]

The crucial legitimating factor for the process of legalization of human rights discourse comes from the analytical school's understanding of a legal order. The latter makes the crucial link between the subjectivity of human values, the irrationality of all value-based decision-making, and the saving of the analytical clarity of the idea of law – in this sense, the objectivity of the legal order – through attaching the epithet legal validity to the concept of coercion. That norm is legal, which is ultimately enforced through a sanction. Enforceability becomes the central point of effectively held values. Nothing has value unless it can be enforced. How a rule is arrived at and what its content might be are meta-juridical matters, of perhaps historical or philosophical interest. What counts for law is the fact that a rule will be regularly enforced. In this framework what matters about human rights is that they should be enforceable.

This is a perspective rooted more generally in analytical jurisprudence. For the sake of discretion certain variants of this approach may not place emphasis on the notion of sanction. Yet it remains in the background and is automatically related to it, precisely because of the function of law in making consensus effective. For instance H. L. A. Hart's *Concept of Law* (1961, 1994) supposes the priority of whatever happens to be the dominant (i.e. general or community) perspective of the chief officials of a legal order as opposed to recalcitrant minorities or dissident members.[23] This rigorous dichotomy is essential: either legal officials or outlaws (or 'bad sports' in more discrete versions of the story). The acquiescence of 'the rest' completes the picture. This curiously defined community (read: coalition) priority is inevitable given the value skepticism that underlies the analytical approach to law. That is, if all values are a matter of subjective preference, the only objectivity possible will come from a formal consensus of a majority, or of dominant key figures representing a majority. In this dominant analytical approach one understands legal obligation from the internal perspective of those applying the law, namely the legal officials, especially the judges. What these officials have internalized as the demands of norms will be eventually enforced.

Hart makes impossible any direct reference to human rights as attaching to a 'person as such.' This would be to treat rights as facts,

as directly derived from a situation, that is the condition and needs of a person. Instead, Hart praises Bentham for realizing that the statement 'You have a right' has to refer to the existence of a law imposing a duty on some other person, 'and, moreover, that it must be a law which provides that the breach of the duty shall be visited with a sanction if you or someone else on your behalf so choose . . .'[24] Such an approach is effectively to eliminate all the elements from the idea of law except the use of force. The subject is dissolved into an addressee of norms, which destroys any possibility of human rights as real. Man exists as an artificial construction of the state. Values incorporated in norms cannot be true or false but only valid or invalid, because they rest on a social power that is capable of compelling the individual to behave in a certain way. This can only be group power, the contagion of custom.[25]

For Hart the problem has been confusing the explanation of the definition of law with the correspondence theory of truth. He praises Bentham for realizing this. 'By refusing to identify the meaning of the word "right" with any psychological or physical fact it correctly leaves open the question whether on any given occasion a person who has a right has in fact any expectation or power . . .' While Bentham puts the emphasis on punishment in a system of rights, Hart sees that many would prefer to speak of remedy: 'But I would prefer to show the special position of one who has a right by mentioning not the remedy but the choice which is open to one who has a right as to whether the corresponding duty shall be performed or not . . .'[26]

This argument represents a slight change of emphasis towards the individual who is the eventual beneficiary of the right conferred by social power. Far from changing the tone of the sanction-based approach to law, it might even be likely to increase the prospect of unilateral action in defense of one's rights if the social power is thought to fail. After all, there cannot be a right if there is not a remedy.

Recently, Tuck has highlighted possible origins of the connection between liberalism and the view of legal order as having sanction as the lynchpin, specifically with reference to the international dimension. Individualism requires an overwhelming social power to confront it, if there is to be any possibility of order. As Tuck puts it, the primary source of conflicts, outside of civil society, are epistemic in character. His interpretation of Hobbes is that while persons are fundamentally self-protective and only secondarily aggressive, it is the differing judgments which people make, arising from the fact that

there is no objective standard of truth, which makes people secondarily aggressive. So, concludes Tuck, 'it is the fear of an attack by a possible enemy which leads us to perform a pre-emptive strike on him and not, strictly speaking, the desire to destroy him.'[27]

Hobbes's metaphor of the *Leviathan* is acutely tied to the necessity of the link between the freedom of the individual and state positivism. The state has to be omnipotent in the making of laws and the final arbiter of any dispute, as there will be no agreement as to how a norm is supposed to be applied. As all laws have need of interpretation, the idea of law must be subordinated to the question of who interprets it. Whether the authority within the state is democratic, aristocratic, or monarchic does not matter. The power it has must be of 'an absolute sovereignty.'[28]

A connection between Hobbes and modern legal thought can be seen clearly in Kant's vision of world peace, which arguably leads to the idea of a coercive international legal order. It is by accepting Hobbes' anthropological vision that Kant is driven to conceive of international peace in terms of a coercive confederation of states that is, to a considerable extent, reproduced in the UN Charter. Some formulation of overwhelming force is the only option from within the Hobbesean vision. Tuck develops this as his central argument about Kant, as the pinnacle of the European Enlightenment tradition. 'As Kant says in his *The Metaphysics of Morals*, 'For a lawful condition to be established . . . it must be subject itself to a public lawful external coercion . . .'[29] Tuck also quotes Kant from the *Critique of Pure Reason*, 'As Hobbes maintains, the state of nature is a state of injustice and violence, and we have no option save to abandon it and submit ourselves to the constraint of law . . .'[30] The explanation for this grim picture of the powerful state is simple. It is the shadow side of the freedom of the individual. Kant believes that 'individual men, peoples and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it*.'[31]

Whether an international coercive legal order is possible is, and should remain, an open question. However, the perspective being criticized here requires that there must be a pyramidal structure to international society that completes the state legal order with an international legal order that closes off any anarchic autonomy for the state. This is Kelsen's main contribution to contemporary thinking on international law. It should be at most an instrument for a centralizing global order, with clearly delegated juridical functions. The so-called rights of a state are no more or less than those conferred on it

by the international legal order. This is the only analytically conceivable approach to the existence of the state (read, nation).[32]

Therefore the state can itself, and should be, coerced wherever it appears to transgress international legal norms. This is the most essential character of the norms. So the state (nation or collective community/entity) is no more a fact than the human being. It is a reference point for the potential coercive application of norms. The social power of the international community, through the inexorable development of international custom and multilateral treaties, must all weigh down on the individual anarchic state to ensure its conformity to law. This is why the very idea of law has a demobilizing effect, whether directed to individual human beings or collective communities such as nations. [33]

This idea of law is also inherently imperial and hegemonic because it cannot accept a legal vacuum, a failure to institute a complete and efficient coercive order. The structural deficiencies of the legal order that Kelsen has identified as essential simply have to be overcome: the vagueness of legal norms and the lack of automatic enforcement of norms within the framework of the law of the UN Charter mean that an apparently nihilistic vacuum opens up, which has to be closed somehow, even if by unilateral interpretation and enforcement. At the same time, those acting unilaterally also feel compelled to constitute themselves as the substitute for the community they see as failing. They have no other way of thinking about law. The liberal ideal of law has to be institutional, that is, it does require some authority to state what the law is and to enforce what it says. And yet it is not able to provide the institutional framework, at the international level, to qualify as law. It does not automatically interpret actions as legal or illegal or guarantee security. Nor does it impose sanctions automatically. So, it is inevitable that states will not refrain from enforcing their rights individually whenever they consider them violated – if they can.

Philosophical Responses to a Neo-capitalist Human Rights Ethos

In economic and social theory, methodological individualism is an Anglo-American cultural construct. It makes a clearly universal claim which leads the members of this same culture to suppose that the removal of any state structure will cause everywhere the reconstitution of civil society. In his topology of legal cultures Green situates the US (and effectively the neoliberalism of the UK as well) within a metaphysics of a warrior's perspective. As trials of strength become

the means by which an individual can prove his worth, one can triumph only by having more power than another. The law/state as an impartial spectator ensures an even playing field by excluding certain tricks from the game, as force and fraud. Apart from that the ethical climate is Hobbesean.[34]

In her global topology of state–business relations the Australia-based specialist in comparative politics Linda Weiss picks up the same themes as Green in her reflections on English language literature about specifically Taiwan, Korea, and Japan and their government–business relations. This literature considers that either government dominates or business dominates. The state either succeeds in *imposing* a course of action or meets *resistance* in one form or another. She questions whether the changes in these countries in the 1980s and 1990s constitute inter-systemic change (i.e. from a state-guided to a market-led pattern). Instead, she points to intra-systemic change (involving increasing complexity of tasks and modes of fulfilling them). Her general conclusion from her empirical research is that in the 1990s in East Asia 'the state has promoted, strengthened and maintained a social infrastructure (a dense organizational structure of industrial networks, cartels, trade associations, and vertical and horizontal councils) to pursue those very leadership strategies on behalf of a given sector . . .' She concludes that it means nothing to ask who is following whom, and that 'there is much about the East Asian political economies which confounds and eludes conventional Anglo-Saxon categories . . .'[35]

It is this Anglo-American cultural judgment which underlies the whole rationale of the WTO, World Bank, and IMF. The aim is to assure the retreat of the state in the allocation of resources and the advance of the market. Government oppresses, whether efficiently or inefficiently (i.e. in its own terms). Authoritarian behavior, by foreigners, both creates uncertainty and induces a state of infancy. It is assumed that individuals act to increase their own wealth, but only provided they are certain about the consequences of their actions. If the state is acting according to an uncontrolled discretion, this serves to increase uncertainty, and therefore this uncertainty will lead to hesitation, even to indecision and apathy, i.e. to economic stagnation.[36] In practice, Dunkley argues that while it is difficult to distinguish between the effects of globalization and anti-welfarist ideological trends, it is likely that the downward pressure on taxation and welfare will continue worldwide, with cost considerations becoming more important.[37] What this really means is the destruction

of the very idea of the right of economic self-determination of peoples. International economic relations after 1945 were to be regulated upon the belief that economic sovereignty and nationalism must be restrained through international organization, so as to ensure that cross-border transactions are not restricted by discriminatory and predatory practices. However, at the same time it was assumed that national economic sovereignty could be legitimately used for the social democratic purpose of ensuring a minimal of social welfare in national societies. Since the mid-1970s international economic relations have entered a new phase of finance capital-based movement or speculation, which is outside any regulatory control.

Arguably modern economics, viz. capitalism, created and needs the nation-state as a framework for development. The unified market, the control of a currency, and a stable fiscal regime are essential for capital accumulation. The question is how to cope with the plurality of such entities. Free trade has the primary objective of assuring, in the first instance, the coexistence of nation-states as opposed to struggles for existence among them, which could lead to mutual destruction. The principle of comparative advantage, as an ideal, means that each nation has such a thing, and, therefore, exchange among the nations will assure trade without friction, and ensure international peace.

At the same time this happy logic has internal contradictions. The logic of capitalism is perpetual expansion and there is no reason, in economic terms, why one or a small number of states should not successfully absorb all the others, or at least set completely unequal terms of exchange. Resistance to this 'natural tendency' need not confine itself to economic instruments or means. The flourishing of GATT/WTO and regional trade areas (RTAs) since 1945 have been directed against the nationalism which was seen as the cause of the pre-1945 conflicts. The question is how to interpret this development.

The view accepted here is that there was a single, overwhelming, strategic victor in the Second World War: the United States.[38] Even if the Soviet Union played the major part in the defeat of Nazi Germany it was not skillful enough to realize the fruits of its victory. In stages, and without it being a question of implementing a completely preconceived plan, the US has managed to unite the West, including Japan, in an informal political, economic union, first against the Soviet Union and then against those states south of the 'color-line' in a management of the world economy in which the explicit legal rules of the Bretton Woods system were always only a part. In this construction the demonization of nationalism as particularist, divisive,

and, finally, self-destructive, is essential. There is no place in the rhetoric of human rights, the rule of law, and democracy, coming out of international institutions and RTAs such as the EU, for national state autonomy. The latter is not seen as an economically meaningful concept precisely because the aim of 'deep integration' is the elimination of all barriers, at least among the 'Group of Seven (Eight?).' The WTO expresses only a part of this integrative project. The project has entailed the elimination of European colonial empires, the cause of one if not two world wars. It has made 'nationalist' conflict among Western powers appear ridiculous.

Yet it is precisely this disappearance of traditional conflict which needs to be examined closely. It is partially a function of the exhaustion of all of these powers except the US after 1945, so that only the latter has been able to act with the coherent sense of its national interest, which others had separately exercised with apparently disastrous results. However, it is misleading to speak exclusively of a completely separate US national policy. There has arisen a Western/Northern economic identity, which former members of the Soviet bloc wish to join. In other words, this identity is white. Yet its intercontinental character makes it difficult to continue to use comfortably the label *national*, albeit one can continue to think of the political organization of a territorial space to ensure the development of economic activity, a space which may not be global. Indeed, it is argued here that if this space is not truly global, the continued use of the term *national* in its pejorative sense, is justified. 'The West'/North is a concept of national identity.

What does West/North exclude? The so-called third world remains a primary provider of raw materials and low-technology, intensive manufactured products, as well as a source of cheap labor for continued 'fordist' manufacturing production. Apart from this division between North and South the traditional arguments for international trade are largely formal. Exchanges in manufactures and services are merely reproductions of the same (e.g. cars, computers, etc.) wherever in the West. They could be produced 'at home' in a national market, but there is equally no reason, political or economic, why identical products should not be exchanged across borders within the West. The question is whether 'the rest' can be, or need be, integrated into this process. The best answer to this can be seen in observing the attempts of third world elites to attain equal status through the rhetoric of economic self-determination and a new international economic order in the 1960s and the 1970s. They inherited the structures of colonialism, and the question was whether they could break out of

what had become neocolonialism. Even their attempts to change the percentage of rent out of the extraction of natural resources, including cheap labor, was successful only in the one instance of oil production. Although third world states were founded on a rhetoric of nationalism, it has been easy, by means of the rules favoring freedom of trade and investment and the reinforcement of Western intellectual property rights, to assure that third world state nationalism, as an independent political element, is demonized as a source of corruption and economic irrationality. International economic law, as well as the more informal exercise of US-led Western hegemonic economic power, has virtually completely delegitimized the third world state as an independent initiator of a locally coherent or cohesive economic development. All development must be 'outward,' export-oriented towards the West.

Have developments since the 1980s done anything to render the classical colonial and neocolonial divisions more fluid and less confrontational? Again it would appear that the 1990s have seen a more direct reassertion of Western rule over the South.[39] When the rhetoric of the new international economic order was in full swing it appeared that the world system accepted the permanence of new states which would attempt to develop some measure of social cohesion within their boundaries, on the basis of which they might develop complete economies along the lines of Western industrialization since the nineteenth century. On this basis new states could gradually be added as full members of the international order. Economic self-determination might then run parallel to the right to political self-determination, found in the UN Human Rights covenants.

However, new trends in international management and technology diffusion meant that such autonomous industrial-technological development was improbable. It made more sense for Northern-based TNCs to farm out subsidiary activities in terms of a global strategy over which they could retain control. The primary reason for locating in the South would, as usual, be the cost of labor. The ultimate aim would be re-export to the North, which meant that there was no economic need to consider the expansion of consumer demand within local Southern markets. The reinforcement of intellectual property rights through the Uruguay Round would ensure the retention of overall direction. Indeed, even these relatively advanced industrial activities could be confined to a small number of newly industrializing countries, which the North might encourage for strategic reasons – the states on the rim of China, Taiwan, South Korea, and perhaps

Indonesia. Beyond that it was necessary to ensure that possession of natural resources did not provide a basis for the development of indigenous industrial development through processing. Efforts by Ghana and Jamaica to develop bauxite production into aluminum, etc. could be crushed. Gulf oil dollars could be channeled into Western TNCs and rogue nationalist states, such as Iraq, Iran, Libya, China, etc., could be identified as not suitable to be partners in the international system and integrated into its international economic law regime.

None of this is to say there is a complete, consciously worked out strategy of control. However, circumstances favored an ever-tightening grip. The debt crisis of the early 1980s was brought on by a wide variety of factors, including the US arms buildup against the Soviet Union. However, the debt crisis favored buying up potential independent industrial development in countries such as Mexico through debt–equity swaps. It enabled the IMF and World Bank structural adjustment programs (SAPs) to stress the need to orient particularly agricultural developments to cash crop exports, which could pay off debts. Especially in Africa, public funds were directed away from education and training to cash crop exports of vegetables and fruit to Europe. In other words, the economic activity of the individual South countries could be both directed from outside and for the interests of the North. Throughout there was a net transfer of wealth from the South to the North, so that Northern control could continue and the possibility of an expanded socioeconomic base within Southern countries be foreclosed.

Hence has come the argument, introducing this chapter, that the period 1980–2000 has seen such a weakening of the state infrastructure in the South that the North is on the point of having to complement its IGO (WB/IMF/WTO)-led SAPs and its decentralized, subcontracting-led TNC management strategies, with a new, overtly military-political role for the North. Hence the aim now in both the EU and the US is to think of the development of rapid reaction forces of a policing character and the evolution of doctrines of humanitarian intervention to assuage the acute crises and divisions in numerous Southern countries. Explicit doctrines of the export of the rule of law and democracy are on offer, with the threat of economic sanction and even military intervention albeit within a context in which the economic options at a global level have already been set by the TNCs and IGOs. Democracy, the rule of law, globalization of human rights, etc. serve to prevent the Southern countries from deriving any legitimacy from the development of local state structures, which could serve to

ensure the gradual evolution of local socioeconomic solidarity or cohesion. This is reflected in the detail of WTO hostility to policies of subsidization of local agriculture or industry, restrictions on foreign ownership, and, hugely inconsistently in terms of liberal ideology, in the maintenance of intellectual property rights. However, the rhetorical character of this ideology must be underlined. The disapproval of economic nationalism in Western-educated opinion is attributable to the economic imperialism of the pre-1914 years and to the aggressively protectionist nationalism of the 1930s. In both cases the culprit was taken to be Germany, which is the home of List-based theories of economic development through state cultivation of national industry based on the national market as a preliminary to participation as an equal in international commerce. It is believed that such a territorially and probably ethnically-based view of economic development made inevitable German thinking in terms of the size of colonial empires, and encouraged Germany, in the 1930s, to set about constructing an identikit colonial empire in Eastern Europe, which would enable it to remain autarkic in relation to the global system dominated by Anglo-American economic power.[40] Hence, there is perhaps an unconscious Western tendency to see any serious, or apparently serious, opponent to its world economic strategies in terms of new Hitlers, especially in the Arab world. At the same time such an historically-based ideology also serves present political interests of Western countries.

It is well known that many services, such as the media, entertainment, computer software, and the food industry, directly embody cultural values and symbols, or so-called 'cultural baggage,' although certain goods, such as clothing, cars, toys, etc., do likewise.[41] In particular the media and audiovisual sectors swamp world markets. US films now account for 70 per cent of the market in Europe, over 90 per cent in the UK and Ireland, and virtually 100 per cent of the Caribbean market. Supposedly American 'industrial cinema' now 'controls 80 per cent of the world's culture.' This is in spite of the fact that, under the Uruguay Round, there was no agreement for liberalizing the audiovisual sector. Indeed, the free trade argument that a deficit in one sector will be countered by a surplus in another 'is a furphy [i.e. rumor] . . . because the more US culture we are forced to watch on prime-time television the less of our own we see . . .'. American films and TV programs account for 40 per cent of the world market and audiovisuals are the second largest US export sector after aircraft, and yet imports account for barely 2 per cent of the domestic US market.

It has been argued [42] that language has always been about power first, culture and learning second. 'Blue jeans and Hollywood played their part in this, but it was Cruise missiles and Stealth bombers that became crucial to the process . . . ' Eighty per cent of home pages on the Web are in English compared to 4.5 per cent in German and 3.1 per cent in Japanese. While there are many studies to argue the cultural superficiality of globalized English, on the face of it the political passivity of most governments of the world towards Anglo-American hegemony, appears to bear out the success of methodological individualism as a global role model. The positive rhetoric of the neoliberal international economic order is that it spreads to and implants in the non-Western world the legal values of democracy, the rule of law, and, above all, human rights. However, the next section has to endeavor to unpack the senses in which this legal ideology merely brings to a head the absence of human value, which the above international regulatory framework is supposed to serve.

CONCLUSION

The idea of a community giving itself a legal order of human rights has to suppose a minimum consensus on the meaning of the human person and I suppose that this does not exist at an international level. I claim that the language of human rights supposes something evident and beyond contest, while the global moral consciousness is obviously contested and will remain so. Human rights research is also made problematic because the community of legal scholars who discuss the language of human rights is not, in my view, open to debate philosophical foundations for human rights. It consists predominantly of a classical modern or postmodern version of supposedly anti-essentalist libertarianism. Human beings have no essential nature and their identity is a mixture of social convention and personal choice. The post-metaphysical, postmodem discourse theory approach to the subject is no exception. Its equally radical subjectivism is particularly appropriate for the demands of advanced consumer capitalism.

I attempt a number of hypotheses about what I consider to be very likely connections among certain features of Western legal culture. So, I suggest a connection between three legal phenomena. Western language about human rights favors a voluntarist understanding of these rights, i.e. rights are a matter of statements of personal preference. They are not transcendent or objective in any sense. This perspective

accommodates classical liberalism that sees political obligation as contractarian. It also accommodates postmodern theory which sees the world, ideally, as a cacophony of desire. However, most importantly, it accommodates the consumerism of advanced capitalism. The market also means the legitimacy of personal preference and the satisfaction of desire, all confirmed through the institution of contract.

The second legal phenomenon, characteristic of Western legal culture, is to identify law itself in terms of criteria of validity, the primary, and, in my view never absent, criterion being sanctions, ensuring effectiveness. This second phenomenon is clearly related to the first in that the search for verifiable criteria with which to identify law leads to a preference for the apparent objectivity of 'brute' material power over value speculations seen as inevitably inconclusive. What is perhaps not so readily recognized is that voluntarism as a basis for human rights makes inevitable the recourse to sanction as the criterion to identify law. Since there is no objective rationality, or conclusive discursive theory to resolve differences, recourse must be had to the weight of the majority or some overwhelming combination of material interests.

The final legal phenomenon concerns specifically the contemporary character and development of international law. This is marked at present by the crisis of even the pretence of a universal international legal order, as represented by the United Nations and its Charter. The latter is replaced by a coalition of the international community committed to the forceful implementation of the human rights of liberal democracy and the rule of law. While these legal values are represented as cosmopolitan or universal ('Who wants to be tortured by a vicious dictator?' etc.) they are also entirely compatible with the expansion of Western economic interests. What needs the closest scrutiny is the relationship between the two – cosmopolitan values and economic interest. Can the result still be characterized in any sense as a global legal order?

The Necessary Conditions for an International Legal Order or System

It is vital, before one comes to ground and analyze fundamental values for international society, to understand the extent to which it actually enjoys constitutional structures at all. This context is essential to explain the possible place of standards of legitimacy. It is the significant measure of absence of a global constitutional order, which

requires that standards of legitimacy must fulfill, in large part a role of recognizing pluralism of values. That is to say, they will have a defensive character, designed to instill skepticism about common standards. At the same time basic values have a fundamental character precisely in the sense that they ensure that *legal order is the effective alternative to civil war whether at a national or an international level*. These are contradictory aims. The values must have an anti-hegemonic role, but at the same time, they will not co-opt violence, if they do not win the consensus of the main holders of the potential for international violence, the hegemonic liberal democratic, capitalist powers, with their supposed passion for unrestrained personal autonomy.

This dilemma is clear to Keohane and Grant in their study of the possibilities of achieving accountability in international relations. They isolate the different elements of the problem. For them, there is clearly no large and representative global public, people who share a sense of common destiny and are in the habit of communicating with one another. [43] As they put it, 'There is no juridical public on a global level, since no legal institutions define a public with authority to act globally.'[44] Constraining abuse of power of states depends upon whether they are weak, poor, and dependent, independent but not great powers, or great powers, hegemonic states. It is the former who are susceptible to the rules of fiscal accountability.[45] Independent states are very difficult to hold to account, unless they voluntarily engage in multiple relationships of interdependence.[46] The crucial third category of state does not depend on others and can resist legal accountability. Peer accountability and reputational accountability are the only recourse. Transparency is important, but so also are agreed standards of legitimacy and the possibility of sanctions. All three have to play a part, and, one must assume, 'Power wielders certainly cannot be expected to hold themselves to be accountable- they resist accountability because it restricts their autonomy.'[47]

So there is a limited but absolutely vital place for the development of philosophical standards of legitimacy to provide a framework for peer group evaluation of the hegemonic liberal democracies. There is place or space to counter the liberal, market, warrior culture of methodological individualism while not pretending to replace it. It will count especially with the category of so-called weak state, in Grant and Keohane's scheme, but it will set the scene for the final chapter, in which an altogether milder anthropology to ground international legal relations will be outlined.

As much as Bartelson, De Sousa Santos realizes the necessity of returning to early modernity, to the time of Hobbes and Descartes. In his development of an argument about the transition from modern science to postmodem knowledge, he notes the significance of Cartesian rationalism. Cartesians suppose that it is possible to divide elements into precise parts, which it is then possible to observe and measure with accuracy, because the past will repeat itself in the future. The hypothesis of mechanical determinism has to be that the whole of reality can be reducible to the sum of the parts into which we divide it in order to observe and measure it. The assumption that one can formulate laws of nature is based upon the idea that the observed phenomena are independent of all but a small number of conditions – the initial conditions – whose interference is observed and measured. The idea of a cause is, in fact, something that can be acted upon. The possibility of precision is essential to a method, which rests upon the progressive subdivision of the object of knowledge. Once the frontiers of the object of knowledge become unclear, the whole methodology breaks down.

The main argument against mechanical determinism is that human action is radically subjective. Unlike natural phenomena, human behavior cannot be described, let alone explained, on the basis of its external, objective characteristics, since the same external act may have multiple interpretations. De Sousa Santos relies upon Ernest Nagel's *The Structure of Science* for the argument that there are no explanatory theories in the social sciences that would allow them to abstract from reality in such a way as to be able to search for adequate proof in that reality in a methodologically controlled way, because social phenomena are historically and culturally conditioned, and because human beings change their behavior according to how much is known about it.

At the same time in the field of microphysics Heisenberg and Bohr have demonstrated that it is not possible to observe or measure an object without interfering with it. The idea that we know nothing of the real other than what we ourselves bring into it is well expressed in Heisenberg's Uncertainty Principle: we cannot simultaneously reduce the errors of measurement of velocity and of the position of particles; whatever we do to reduce the error of the one will increase the error of the other.

What is quite simply fundamental here is the subject's structural interference in the observed object. The conclusion is that knowledge is always a struggle involving two subjects, rather than a subject and

an object. Each is the other's translation, both are the creators of texts. As de Sousa Santos puts it:

> Once these intertextualities become self-reflective and aware that they constitute 'congealed' social relations and social processes by which some people or social groups are denied the play, the stage, the text, or are silenced by force, then they can become emancipatory local projects of post-modernism, undivided knowledge . . .[48]

This is a principle of radical epistemological equality that serves to insist upon a level playing field against the economic hegemons, which are also always potentially militarily threatening. De Sousa Santos proceeds to apply this *epistemological* critique to the *state civil society* dichotomy to bring out systematically how far these apparently precise concepts are rhetorical aspects of what might be characterized as *raging subjectivities*.[49] The object of the dichotomy is to depoliticize civil society, to take it out of the field of struggle. That is to say, the purpose of the separation is to naturalize capitalist economic exploitation and neutralize the democratic ideal by confining it to the constitutional space. Dichotomies serve to exclude diversity. De Sousa Santos points to at least six dimensions of informal law which can be delineated. The *citizen-place* is the set of the social relations that constitute the 'public sphere' and the relations of production of the vertical political obligations between citizen and state. It is to this place that the problem of law and of political power is now confined. Law is what emanates from the state, and the problem of power is that of controlling the state. This rhetorical device excludes the whole range of hegemonic strategies, which produce unequal social relations and facilitate the unreflective and uncritical power of some over others.

The *marketplace* is the cluster of social relations of distribution and consumption of exchange values whereby the commodification of needs and satisfiers is produced and reproduced. The *household-place* is the cluster of social relations of production and reproduction of domesticity and kinship. The *workplace* is the set of social relations clustered around the production of economic exchange and of labor processes. The *community-place* marks the social relations of production, etc. of physical and symbolic territories. Finally, the *world-place* is the sum total of the internal pertinent effects of the social relations through which a global division of labor is produced, etc.

The difficulty for any so-called causal analysis of law and economic development in terms only of the state and the market is that each

dimension of each structural place is in some way present in any other. One might expect that also in East Asia the state, the family, the community, the market, etc. all intermingle. Obviously, some states are run as extended families, as are many corporations, etc. Equally, gender relations will have a crucial impact on production relations. Race, ethnicity and religion, which make up the *community-place*, also permeate the *marketplace* and the *workplace*. Obviously, with the fetishism of commodities the apparent pragmatism of the *marketplace* becomes entangled in the symbolism of the *community-place*. Yet the two forms of law that are allowed by the *state/civil society* dichotomy are merely the territorial law of the *citizen-place*, and the exchange law of the *marketplace*. The rest is excluded. What this self-imposed limitation on the meaning of law makes inevitable is the sense of an incomplete picture and even of confusion in the description of contemporary economic reality, because all six forms of legal knowledge are partial, local, and contextualized, limited by the clusters of social relations of which they are the epistemological 'consciousness.' The epistemological implications for distortion and exclusion of vital human perspectives from analysis are only to be expected if one confines attention to those who determine the *citizen-place* (whether or not democratic, in whatever sense that means) and the *marketplace* (however far removed from the *workplace)*. Because their perspectives are partial and local, it is not possible to extrapolate from them an overall panorama of developing economic events.

Unger sees the need to conciliate in what is at most a pluralist, level playing field of international relations. It is suggested that field research (the word *empirical* is avoided because of its epistemological implications) into the possible relationship of international economic law to real development needs has to be primarily in the area of *informal law*. In this area one has to disentangle the legitimate concerns, which underlie the *state/civil society* dichotomy and identify how these are actually operating in contemporary world societies. All law, whether or not it is reduced to the law of the state, will be disempowering to the extent that it merely reflects traditional hierarchies and enshrines social constraints, which inhibit individual initiative. Such constraints are just as likely to come from strict adherence to principles of contract and corporate law when these merely ensure the stability of transactions among rigidly established economic groups whose cohesion rests upon closed family, ethnic, or other group identity. Unger warns against the abandonment of civil society to the organizational devices of traditional contract and corporate law,

facilitating the division between the organized and the unorganized and setting the stage on which the big organized interests can make deals among themselves.[50]

The functionalist approach to law is the belief that the merging and diffusion of legal arrangements can be explained by their supposedly unique capacity to fulfill inexorable requirements of practical social life. Unger suggests, as does de Sousa Santos, that functionalism, if it is to appear to succeed in its explanatory function, will have a tendency to oversimplify. He claims that the indeterminacy of such concepts as market economy and the illusory character of a belief in the existence of a single definite system of rights – especially contract and property rights, as well as rights of property against government – are due quite simply to the immense variety of possible institutional arrangements which will favor economic development in specific contexts. These varieties can only be grasped through field research into informal notions of obligation: meaning the sense of individual actors and groups of what they are entitled to require of others and obliged to offer to others.[51] In the East Asian economies, suggests Unger, an elitist and authoritarian partnership between business and government may have proved successful in sustaining economic growth in a world of semi-skilled mass production. It may nevertheless prove insufficient and damaging when industrial evolution calls for higher levels of flexibility, knowledge, and work-team self-direction.[52] One should not lose sight of the fundamental aim, to encourage individual experimentation, through flight into the illusion of an objective law, which enshrines the command of existing socio-economic hierarchies.

At the same time the value of an experimental individualism freed of tradition could be lost if excessively rapid modernization was to introduce such radical uncertainty into social relations that transaction costs would appear insurmountable. Again, the tracing of and building on informal legal practices should be crucial. It is obvious that people engage in economic activity for a variety of reasons, of which a clearly defined determination to maximize individual wealth is only one. The desire for social prestige and distinction is important and this is bound up with class, family, and ethnic loyalties, which provide the corresponding peer-group assessment. Hence, it is usually to be expected that the competitive and the collaborative drives will come together. A question is whether the former suffers at the expense of the latter where the latter takes on a regressive or conformist character. Again, Unger calls for a radical polyarchy, to transform society into a confederation of communities not simply shaped

along ascriptive lines such as race or religion. However, only an illiberal dogmatism would wage war against the community-defining powers of religion and race. Indeed, the most extreme form of dissolution of community may well be the radical indeterminacy of economic behavior, which is anxiety-driven speculation, whether in shares, currencies, or properties. The fear and confusion, which such behavior may stimulate, should not be the occasion for escape into a backward mythologizing of the past to reverse the ills of a supposedly individualistic society. Nonetheless, the essential collaborative dimension of economic, as of any other form of innovation requires self-directing networks of groups, which are able to cooperate.[53]

Where do these deliberations leave the *state/civil society* dichotomy? The basic message of critical legal studies, represented by Unger and de Sousa Santos, is that traditional legal doctrine – and with it, the hopes attaching to an independent rule of law – is presented as natural and inevitable, when it is in fact historically contingent and very much the result of choice. Instead, 'reality' is a cultural and social construction. In other words, there is no escape from Heisenberg's Uncertainty Principle into the rule of law. Indeterminacy and choice are two sides of the same coin. Contradictory claims, typically between communal security and individual freedom, are inevitable. The political vision offered is civic republicanism and decentralized socialism.[54]

If critical legal studies are not themselves to become dogmatic sloganizing, one needs to attempt to locate precisely the type of situation to which they respond. Following Unger, rule of law ideals and administrative efficiency require that law be formulated as a body of rules and doctrines conferring typical, stable claims upon broad groups of role-occupants: citizens, taxpayers, consumers, etc. There may be divisions among the interests producing these laws, but they are not so deep, nor the governing elites so fragmentary and sectarian, that they cannot rely upon a judiciary to complete their agreements. However, if the divisions and alternatives presented in democratic politics sharpen, the devolution of law-completing to an insulated body of experts makes no sense.[55] What is argued here is that no single, closed, and coherent system of rights can be inferred, by any analytical procedure, from the idea of the market economy, and no real version of the market economy can abolish conflict. This is all that is meant by saying that there are unavoidable clashes among supposedly indefeasible rights. What is therefore needed is a strong state, a strong governmental power that is able to formulate and implement

policy at some remove from dominant economic interests. Otherwise entrenched hierarchies and imbalances become naturalized.[56]

Of course, to assert the need for an impartial political authority is to state rather than to resolve the problem of democracy. It is simply being asserted that impartiality is a matter of politics rather than law. However, the goals of democracy in the context of economic development remain clear to the radical emancipatory individualism of this project. They are, in the words of Unger, 'first, to enhance the practical productive capabilities of society, the resources of restless practical experimentation and innovation; and, second, to diminish the extent to which participation in group life pins us down to mechanisms of dependence and depersonalization and thereby undercuts self-assertion, the effort to develop and sustain individual presence in the world . . .'[57]

Notes

1 *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002), Ch. 21, '*Philosophy of International Law*.'
2 *A Philosophy of International Law* (1998).
3 *The Law of Peoples* (1999).
4 *Oxford Handbook*, 887.
5 See Teson, *Philosophy of International Law*, chapter 4, 'The Rawlsian Theory of International Law,' esp. 115 and 120.
6 Ibid., 116.
7 John Rawls, *Le Droit des gens*, intro. Betrand Guillarme (1996), 51.
8 Teson, *Philosophy of International Law*, 120.
9 Ibid.
10 See especially, Susan Marks, *The Riddle of All Consitutions, International Law, Democracy and The Critique of Ideology* (2000).
11 This is the central argument of Alain Joxe, *Empire of Disorder* (2002).
12 Mary Kaldor, *New and Old Wars. Organised Violence in a Global Era* (1999).
13 H. L. A. Hart, *The Concept of Law* (1961), 116–17.
14 Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 2nd edition (1984) gives an excellent account of the Western Third World confrontation on this issue in the drafting of the Convention. The West threatened to drop the whole idea of the convention if the Third World countries persisted with their proposal to regulate the use of economic pressure or force. The issue is not mentioned by Anthony Aust, *Modem Treaty Law and Practice* (2000), which may now be the standard current work on the subject, based very largely on the Vienna Convention.
15 Michel Schooyans, *La Face cachée de L'·ONU* (2000), at 222–23.

16 Schooyans, *La Face cachée de L'·ONU*, 37.
17 Ibid., 39.
18 Ibid., 41–2. This is in spite of Habermas's early work on the public space of rational debate since the Enlightenment, which I discuss in 'Changing Models of the International System,' in W. Butler (ed.), *Perestroika and International Law* (1990) 13–30. Schooyans is repeating a standard conservative critique of the procedural liberalism of Rawls, Habermas, and others, which may have first been made by Alistair MacIntyre in *After Virtue* (1987). In 'Critical International Law, Recent Trends in the Theory of International Law,' *EJIL* 2 (1991) 66–96 I suggest that critical legal studies, as applied to international law, simply absorbs MacIntyre's critique of liberalism to produce the indeterminacy of legal concepts, without committing itself to explaining the existing structures of international law as hegemonic.
19 Ibid. This is a summary of the whole first section of Schooyan's book, 'L'Empire du consensus'.
20 See further in Anthony Carty (ed.), *Post-modern Law* (1990) 'Postmodernism in the Theory and Sociology of Law,' at 82–5, in the section, 'Baudrillard and the End of the Social.'
21 Ibid.
22 Many international lawyers have recognized for some time that to treat democracy as an international law right to democratic governance had this violent potential. Any notion of a right must imply that it can be enforced, in Western consciousness. See, for instance, Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (2000), especially the contributions by Koskenniemi, Marks, Byers, and Chesterman.
23 Hart, *The Concept of Law*, 116–17.
24 H. L. A. Hart, 'Definition and Theory in Jurisprudence', 70 *LQR* (1954) 37 at 48.
25 Schooyans, 'L' Empire du consensus', 136–41, with reference to Kelsen.
26 Hart, 'Definition and Theory', 48–9.
27 Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (1999) 130.
28 Thomas Hobbes, *Leviathan*, ed. C. B. McPhearson (1968) 556–7.
29 Quoted in Tuck, *The Rights of War and Peace*, 202.
30 Ibid., 213.
31 Ibid., 208, quoting from *The Metaphysics of Morals*.
32 A. Carty, 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law,' *EJIL* (1998) 344–54.
33 Schooyans, 'L'Empire du consensus', 157–66, esp. 159.
34 M. K. Green, 'Cultural Themes in European Philosophy, Law and Economics', *History of European Ideas* 19 (1994) 805, at 805–6. Green refers to a study of articles in the *Harvard Business Review* from 1940

to 1970, which concludes that the ethical climate of American business is Hobbesean in the sense that the culture is full of conflict and change as individuals attempt to build a place for themselves in a hostile world.

35 Linda Weiss, *The Myth of the Powerless State, Governing in a Global Era* (1998) 69–72.
36 D. North, *Institutions, Institutional Change and Economic Performance* (1990).
37 G. Dunkley, *The Free Trade Adventure* (2000) 162.
38 This follows Robert Biel, *The New Imperialism, Crisis and Contradiction in North/South Relations* (2000) 1–130.
39 Ibid., 154–287.
40 See Hans-Erich Volkmann, 'Die NS-Wirtschaft in Vorbereitung des Krieges,' in Wilhelm Deist et al. (eds), *Ursachen und Voraussetzungen des Zweiten Weltkrieges* (1989), 211–435.
41 Biel, *The New Imperialism*, 183 and what follows, 184–5.
42 Robert McCrum, 'They Are Talking Our Language,' *The Observer* (Review), March 18, 2001.
43 Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics,' *American Political Science Review* 99, no. 1 (February 2005) 29, at 33.
44 Ibid., 34.
45 Ibid., 39.
46 Ibid.
47 Ibid., 39–40.
48 Boaventura de Sousa Santos, *Towards a New Common Sense: Law Science and Politics in the Paradigmatic Transition* (1995) 36–7, and generally 11–37.
49 Ibid., chapter 6.
50 Roberto M. Unger, *What Should Legal Analysis Become*? (1996) 96.
51 This definition of informal law is taken from Leon Petrazycki, *Law and Morality* (1954); for further background, see George S. Langrod and Michelina Vaughan, 'The Polish Psychological Theory of Law,' in *Polish Law Through the Ages*, ed. W. J. Wagner (1970) 299–362.
52 Unger, *What Should Legal Analysis Become?* 123–5.
53 Ibid., 148–52.
54 Nicholas Mercuro and Steven G. Medema, *Economics and the Law: From Posner to Post-Modernism* (1997) 165–9.
55 Unger, *What Should Legal Analysis Become*? 109.
56 Ibid., 155–6.
57 Ibid., 181.

8

FROM AN ORDER OF FEAR TO ONE OF RESPECT

Fear in the Western Liberal Tradition: Ricoeur's Response to Hobbes and Hegel

The predominant anthropology for the place of law in international relations, whether on the side of state sovereignty or international organization, or constitution, has been a radically subjectivist, individualist one. The state of nature, in which sovereign states still find themselves, is reinforced by predatory doctrines of pre-emption in the area of national security and of relentless expansion in the area of economic activity, itself continuously dominated by security interests.[1] This analysis may not be disputed by legal internationalists or constitutionalists. They continue to set themselves the task of harnessing the beast of the state, Aron's 'cold monsters,' into a disciplined framework. There is no reason or wish to obstruct or denigrate these internationalist, constitutionalist efforts. However, their limitations need to be both understood and complemented by a new anthropology of international law. This belief is itself fired by a suspicion that internationalist or constitutionalist endeavors face, ultimately, insuperable obstacles of value incommensurability and power/social fragmentation, but it is hardly necessary to provide final ontological proof of such a suspicion. Both major internationalist projects, the United Nations and the World Trade Organization, are in deep enough crisis, where it is apparent to the mildest observer that egotistical or subjective power considerations dominate the Western treatment of the non-Western world, as they have since the foundation of the rapacious modernity so well described by Tuck.[2]

The modern state of international law has its origins in the distinction between the immaterial subject and the material reality which it observes and analyses. Its gaze is one of fear and expresses a search for security. The name of modernity is fear. The subject of its 'modern' knowledge is a state which names but is not named, observes but is not observed, a mystery for which all has to be transparent. It is the

first problem of this theory of knowledge to find security, which lies in a unidirectional rational control and analysis of others by the self. In the Hobbesean theory of knowledge, there is no place for a reflexive knowledge of self, save for an analysis of the extension (special) of the power of the sovereign self (i.e. geopolitically) up to one's frontier.

The inspiration of the *ius naturale* is that we return to recognize the other as similar, as reflections of the self, images of the self to be found in others because we have a common origin. It is the forces of exclusion, which found state particularism, the opposite of mutual comprehension. Yet the enemy is not on the outside but within the self, an evil which each has to rework. State law creates frontiers but without a human space between them.

It is now well known that Hegel has taken Hobbes's challenge and responded with a theory of recognition, which attempts to overcome the amoral struggle of fear of death that underlies Hobbes's state of nature. As Paul Ricoeur points out, the question is to know whether in this state of nature there is a moral element in the person or subject that can be isolated as the desire for recognition. It is with an original contribution to a theory of misrecognition that Ricoeur will revisit Hobbes, through Hegel.[3] Ricoeur notes the three primitive passions of competition, mistrust, and desire for glory, that Hobbes highlights and remarks how none of these can be known in one person without reference to another. It is the structure of the denial of recognition that one finds most closely in mistrust and most profoundly in vanity.[4] Hobbes is opposing himself to the natural law tradition (including Grotius) that considered law as a moral quality of the person, by virtue of which he could claim legitimately to have or do certain things.[5] With Hobbes one has entered the arena of contract, where there is no element of moral constraint, but instead an entirely voluntary and sovereign precaution, a calculation recommended under the pressure of fear.[6]

Ricoeur notes how there is no relation of one person to the other in Hobbes. Each renounces his right (of self-preservation) to the now sovereign state on condition that the other does. The state enjoys a unity itself, but is not in a legal relation to any of its subjects. The sovereign state is constructed out of a naturalist premise that men are equal enough to be able to kill one another, and that the social contract has a meta-ethical quality, providing security but without supposing any ethical element in the subjects of the state. The dispossession of self is not justified through an expectation from another. There is identification with self (which Locke recognized) but not

with another who cooperates with oneself in a covenant. It was up to Leibniz to restore the other person to the idea of law, under the rubric that law's object is all that belongs to another person, that we can do for him, and that is within our power.[7] As Ricoeur concludes this part of his argument: it is not simply contained in the idea of law that we should not injure another, that we attribute to each what belongs to him, and finally, that we are pleased with the happiness of another. All of these mean also the joining of the self and the other in the very idea of law.[8]

The dynamic of the movement from distrust to consideration and from injustice to respect, coming from the Aristotelian concept of justice as equality, opens itself for Hegel through an institutional structure of recognition, inseparable from a negative dynamic, where each stage is an overcoming of a specific threat, where the level of injustice and recognition follow one another, so that, in Ricoeur's words, indignation takes the place in the Hegelian political philosophy founded on the demand for recognition, that fear of violent death has with Hobbes.[9] It is a matter of reorienting Machiavelli's and Hobbes's struggle for survival, based on fear, into a struggle for recognition based on respect. The relation to Fichte connects struggle and recognition in a link between self-assertion and inter-subjectivity.[10] Full recognition means accepting the other as an absolute. In turn, a crime has the object to deny the specific reality of another who has one fixed in a subordinate relation of difference, while the vengeful response participates in this fixation as a form of slavery. To be fixed in difference is slavery, while to be free of it is to be the master.[11] However, recognition makes equal what the crime renders unequal. It proceeds from the overcoming of exclusion. For Hegel, the legal relation is precisely that the self ceases to be singular and is recognized as being valuable immediately in his being, necessarily recognized and recognizing.[12]

For Ricoeur there is an answer to Hobbes insofar as one can find moral motives that can occupy at least some of the ground of the triad of rivalry, mistrust, and vanity, so as to find in conflictual interaction sources for parallel enlargement of individual capacities, understood as a human capacity to overcome self as identity (*ipseite*).[13] In a large argument, he makes a number of vital analytical distinctions. Discussing Axel Honneth's *Struggle for Recognition*, he says that recognition has two dimensions within the juridical sphere: the other person and the norm. As for the latter, recognition signifies, in the lexical sense, holding something to be valid; as for the former, the

person, recognition has to identify each person as free and equal to all others. This is recognition of the self in terms of capacity, a gradual enlargement of the sphere of rights recognized for persons and a consequent enrichment of their capacities, all within the institutional structure of a struggle for recognition.[14] Ricoeur has to insist that the notion of *identity* is given a differentiated moral and political significance that is not reducible to an argumentative practice demanded by an ethic of discussion.[15] The reason is that the concept of the person is not explained by norms or by discourse. Both presuppose the person, in relation to other persons.

At the same time there is, parallel to the idea of the person, the idea of responsibility, which expresses itself in indignation at the contrast between the equal formal distribution of rights and an unequal material distribution of goods, the humiliation felt where civil rights are denied, and the frustration felt at the absence of participation in the formation of the public will. Responsibility may pass through struggle, from humiliation and indignation onto a capacity to express oneself in a rational and autonomous manner on moral questions. Therefore, responsibility covers both the assertion of self and the recognition of the equal right of the other to contribute to the advance of rights and the law.[16] The process of critique reveals a new dimension of the person, that of understanding another world other than one's own, comparable to learning another language or understanding one's own language as one among others. Translation and the capacity for compromise, as a mutual recognition of situations of conflict, are always liable to be denounced as appeasement, particularly in the Hobbesean context where the person is not considered to have any moral dimension. However, for Ricoeur a capacity for compromise is part of the capacity of the person to recognize himself as a figure of passage from one regime to another, without accusations of relativist disillusionment or superficiality.[17]

The crucial and original question, which Ricoeur poses as against Hegel, Honneth, and Kojève, is directed to the idea of struggle itself. This is born of the desire to respond to the state of nature of Hobbes, itself already opposed to the thesis of the natural law school that human beings have a common sociable nature. It is opposition to classical natural law which grounds a determination to exclude every motive which is originally moral, in the way of coming out of the state of war of all against all. In Hobbes's world one does not even recognize the other as a partner in passions of glory, mistrust, and competition. Hegel's response is the element of the negative, the struggle,

which puts the stress on the forms of the denial of recognition but keeps as a mystery till the end the question of the being-recognized to which the whole process tends. Hegel has no final goal, identifying the nature of the person. If the final result of a successful struggle is to be *self-confidence, respect*, and *self-esteem*, the question remains, when will a subject consider himself to be truly recognized? Ricoeur's question is whether the demands for affective, juridical, and social recognition (the Hegel–Honneth triad) become a 'bad infinitive,' an indefinite demand. The question concerns not simply the negative sentiments of the lack of recognition, but also the new capacities that are conquered, and thus delivered over to an insatiable quest. Does the struggle for recognition not give rise to a new 'bad conscience' driven by an incurable sentiment of victimisation and an unattainable collection of ideal wishes?

The question is how to develop concepts of truce, without over-simplifying the ideas of struggle and of conflict, and without treating their moral dimension as illusory.[18] Ricoeur provides the framework in which one can understand the ethnic-nationalist and Marxist responses to the bourgeois capitalist Hobbesean state, while at the same time endorsing the realization that both offer chaotic responses so far as they rest at the purely formal level. The principles of friendly relations among states, the rights of self-determination of peoples and of economic development, have no clear point of objective realization and indeed promise endless struggle, which may as well be destructive. The forces at work are much more materially dense than the ethic of discourse that does not comprehend any theory of personality. They clearly escape a formal theory of legal development, which rests upon the will of the state as the law-giver, or even the trilogy of democracy, the rule of law, and human rights. For one thing, the latter concept is the Trojan horse in which endless, destructive struggle re-enters the scene.

It may be necessary to recap how these themes relate to a more familiar international law agenda. The legal idea of modernity, which underlies positivism, goes back to Hobbes and attempts to harness his idea of sovereignty. The idea of legal personality as the addressee of legal norms focuses only on the content and elaboration of norms and not on the quality of the subjects of the norms and their relations with one another. Legal positivism reflects upon *what has been produced by the will and never on the embedded context of the will*. In her study of Ricoeur, Molly Mann places Ricoeur in the context of what she calls the myth of constitutive autonomy in Kant and Rawls.

The idea that the individual is completely autonomous before entering into the social contract assumes that individual associations with one another remain uncertain and revocable. She writes that in tracing out the philosophical history of the principle of autonomy, Ricoeur works to undermine the fiction of the self-foundation of the contractual, specifically Hobbesean state and of the Kantian will by arguing that morality must necessarily return to the dialogic and social dimension marked by ethics.[19] Ricoeur argues that the fictions of contract and autonomy are intended to compensate for forgetting the foundation of deontology in the desire to live well with norms and the ethics of discursive argument. Instead, these cannot be confined to themselves apart from the issue of personality. Ricoeur means, as Mann says, that there is no way an ahistorical contract can be binding on an historical community, if we do not have recourse to the solicitous mediation of others that is continually fostered in the institutions of society.[20] The process of acculturation is both historical and ethical. Mann quotes also Dallmayr's comment on Ricoeur, that 'being human is not something "given" (by nature or reason), but rather a practical task requiring steady cultivation in social contexts.'[21] So the dynamic of international legal argument and the normative development of international law is to be found in the embedded historical contexts of the individuals and communities they are both supposed to ground. On their own the legal arguments and norms cannot even be understood and must appear as an endlessly inconclusive circular and self-defeating game.

The introduction of the contextual dimension not merely grounds intelligibility in a hermeneutic understanding of intentionality. It also grounds normative reasoning on the principle that law as justice can only be found where one recognizes that contractualist theory cannot 'substitute a procedural approach for every attempt to ground justice on some prior convictions concerning the good for all, the common good of the *politeia*, the good of the republic or the *Commonwealth*.'[22]

This radical thesis can be immediately illustrated by returning to the theme of fear and the drive to pre-emptive attack, which, as Tuck has highlighted, grounds Hobbes's theory of the state of nature and of international relations. The monological, self-constituting nature of the social contract of Hobbes is possible and necessary only if we remove ourselves from that cultural history which expresses our will to live together. [23] Ricoeur responds with the question, to both Rawls' constitutive autonomy and Kant's autonomy of practical reason, concerning the problem of motivation and instruction. Any arguments of

justice or distribution have to be tied to the essential convictions of society.[24] A collective recognition practice, capable of achieving a collective reconciliation, requires 'a wise deliberation, in the tradition of Hegel, for whom the recognition and reconciliation of difference is the central task of the modern state.' Mann ends on the note that these social bonds 'form a dialectical circuit that is at once the foundation and the project of civilisation.'[25]

The Grounds of Fear in Both Cultural Arrogance and Incommensurability

Perhaps the most concrete way of illustrating the role of interacting recognition practices for international law and relations is to tackle directly the problem of cultural incommensurability, the supposed absence of a common measure between cultures, which, according to Paul Keal, in his study,[26] has been a crucial element in the development of relations between European and non-European peoples. From Keal's perspective Europeans generally made no attempt, or else failed to understand, non-Europeans in their own terms. However, this apparently political issue can reach a philosophical level, when it is formulated, as Keal does, following Anthony Pagden's account,[27] as a matter of an attempt to understand the practices of others by translating a variety of experiences from an alien world into the practices of their own.[28] The idea of incommensurability has been developed most sharply in relation to the so-called issue of *Orientalism*.

The issue, where it is related to the Ottoman Turks, to the so-called Eastern Question is immensely involved. Perhaps the most authoritative English language international law/international relations study of European – non-European relations in historical perspective is Gerrit Gong's, *The Standard of "Civilisation" in International Society*, a doctorate undertaken at Oxford University under the supervision of Hedley Bull. Gong becomes unwittingly embroiled in controversy by beginning his consideration of relations with the Ottomans with a quotation from the Middle East specialist Bernard Lewis. According to Lewis, Ottoman military might and traditional learning underscored the Ottoman sense of the 'immeasurable and immutable superiority of their own way of life' and caused them 'to despise the barbarous Western infidel from the attitude of correct doctrine reinforced by military power.'[29] Gong takes this quotation as authority for his own immediate remark that it was this sense of Ottoman superiority that made the 'infidel Turks' (which he puts in

quotation marks, perhaps ironically) a threat to Christian and European civilization.

Yet, as is well known, Lewis is a cardinal target for Edward Said's critique of *Orientalism*. In his *Orientalism, A Reader*, Macfie identifies how Said treats such a style of argument as an essentalizing of a so-called Ottoman mind, an Arab mind, an oriental psyche, etc.[30] Said argues that this is not merely an imaginative phenomenon but also 'part of an integrated discourse, an accepted grid for filtering the orient into the Western consciousness and an integral part of European *material* civilisation and culture – that is to say, an instrument of British, French and later American imperialism.'[31] In turn, Lewis is taken to object that Said is responsible for an ignorance of historical fact, capricious choice of countries, persons, etc. He is himself firmly wedded to a traditional (realist) approach to the writing of history, while Said bases his approach on the work of what are usually regarded as postmodernist scholars, including Jacques Derrida (deconstruction), Antonio Gramsci (cultural hegemony), and Michel Foucault (discourse, power/knowledge).[32] Inevitably, it is bound to be virtually impossible to agree upon epistemological terms of debate between these two positions.

I am sympathetic to a modified form of the 'Orientalist debate' taken from Sadik Jalal Al-'Azm, 'Orientalism and Orientalism in Reverse,' introduced by Macfie.[33] This author identifies that the cardinal assumption of all Orientalism is 'the insistence on the essentialist separation of the world into two halves: an Orient and an Occident, each with its inherently different nature and traits . . . Orient and Occident fundamental ontological categories'.[34] He picks up on Said's critique of Lewis, explaining Muslim political phenomena in Western categories as being as accurate as a description of a cricket match by a baseball correspondent. Al 'Azm comments:

> In other words, the vast and readily discernible differences between Islamic societies and cultures on the one hand, and European ones on the other, are neither a matter of complex processes in the historical evolution of humanity nor a matter of empirical facts to be acknowledged and dealt with accordingly. They are, in addition to all that, a matter of emanations from a certain enduring Oriental (or Islamic) cultural, psychic or racial essence, as the case may be, bearing identifiable fundamental unchanging attributes. This ahistorical, anti-human and even anti-historical 'Orientalist' doctrine, I shall call *Ontological Orientalism*.[35]

Methodologically, this approach requires that one consider Ottoman-Turkish and so-called European relations historically in terms of

possibly recurring patterns of behavior, attitudes, and even concrete problems that, for all their tendency, are not immutable ontologically and therefore capable of modification, forcibly through events and also consciously, through negotiation.

At the same time, a possibly modified postmodernist approach will recognize that there are collective, if not immutable, actors, whose mutual relations are in large, but never quantifiably definable, measure a matter of reciprocally modified perceptions of the self and the other. Collective identities may dissolve almost completely. Bearing in mind this possibility can only help to understand the nature and limits of the apparent consistency of collectively formed identities. However, such developments of total dissolution in international history are infrequent and anyway always a matter of what Fernand Braudel calls the *long duration*. In the meantime the standard of value with which one has to work is the quality of mutual interpretation. Al 'Azm notes how Said recognizes that it is impossible for any culture, be it Eastern or Western, 'to grasp much about the reality of another, alien culture without resort to categorisation etc., with the necessarily accompanying distortions.' Domestication of alien cultures in terms of one's own is inevitable.[36]

One needs to be realistic about the varieties of possibility of distortion that occur. Since Hegel's *Phenomenology* we have the paradigm of *the master-slave struggle*. Alex Honneth has elaborated at length on this as Ricoeur has noted. The question is whether conflictual, mutual (mis)interpretations can have developmental and positively transforming consequences. In my view the most historically sound working assumption or starting point for European–Ottoman-Turkish relations is that they have been mutually defining since the beginning of at least the thirteenth century and especially in the relatively short key period since the failure of the second siege of Vienna at the end of the seventeenth century. I think that how to characterize these relations in all their complexity is best illustrated by George Steiner in *After Babel, Aspects of Language and Translation*.[37] This is not to favor the subjective and postmodern over hard material facts, but merely to recognize the primacy of consciously held ideas, especially about desirable social organization, in any deliberate negotiating process. Steiner's close readings of varieties of translations allows one to be much more specific about the stages of negotiation among cultures, and the evaluative significance of each stage, in a context which 'concentrates to a philosophically dramatic degree the human bias towards seeing the world as symbolic, as constituted of relations

in which "this" can stand for "that", and must in fact be able to do so if there are to be any meanings and structures.'[38]

Steiner outlines four stages of the hermeneutic motion. In his own words, he says the first motion is a donation of trust, which remains ontologically spontaneous and anticipates proof, often by a long and arduous gap. The translator gambles on the coherence and on the symbolic plenitude of the world. After trust comes aggression, a move of incursion, which is extractive. The postulate is that all cognition is aggressive, an inroad on the world.[39] While this process comprehends by encirclement and ingestion, it is still to be distinguished from the third movement which is actual incorporation, in the strong sense of the word, that the import is domesticated into the native semantic field.[40]

This is where the trouble starts, to put it banally. Steiner notes that 'the act of importation can potentially dislocate or relocate the whole of the native structure. The Heideggarian "we are what we understand to be" entails that our own being is modified by each occurrence of comprehensive appropriation . . . Where the native matrix is disoriented or immature, the importation will not enrich . . . It will generate not an integral response but a wash of mimicry . . .'[41] This can lead to a negative reaction, where 'the native organism will react, endeavouring to neutralize or expel the foreign body.' This is an explanation of the romantic movement, especially of nationalism. Acts of translation may incorporate alternative energies, or we may be mastered and made lame by what we have imported.[42]

So the hermeneutic motion requires a fourth stage, where it mediates into exchange and a restoration of parity. Steiner insists that 'the enactment of reciprocity in order to restore balance is the crux of the *metier* and morals of translation. But it is very difficult to put abstractly.'[43] Steiner follows Hegel and Heidegger, 'that being must engage other being in order to achieve self-definition. Existence in history, the claim to recognizable identity (style) are based on relations to other articulate constructs.'[44] Steiner concludes his definition of the task of the translator with the words: 'He is *faithful* to his text . . . only when he endeavours to restore the balance of forces, of integral presence, which his appropriative comprehension has disrupted. Fidelity is ethical, but also, in the full sense, economic. By virtue of tact, and tact intensified is moral vision, the translator-interpreter creates a condition of significant exchange. The arrows of meaning, of cultural, psychological benefaction, move both ways.'[45]

Personality as Demarcation of Boundaries or Personality Embedded in Relationships: Towards New Possibilities of International Legal Discourse

Steiner's apparently very abstract typology of international relations can ground a new approach to international law once it is realized that international legal order can no longer be usefully conceived as an abstract social contract, viz. the definition of the law as the rules consented to by states, themselves abstract entities whose existence is certified by the mere fact that they are identifiable as addresses of the already mentioned norms. This way of thinking has to be seen for what it is – a way of thinking, a product of Kant- and Rawls-like abstracting of the individual from any context and attributing to him an unlimited autonomy to formulate contract-like rules on any subject. It is an optional way of looking at international society chosen by a specific historical group of self-styled, Western-educated international lawyers who please themselves to 'look at things in such a way.' It is impossible to ask whether their perspective has any 'reality' as answers will only be circular.

It is impossible to add a discourse theory ethic to such formalism, except perhaps to insist on a very rigorous exclusion of coercion in the conclusion of agreements, something the international legal order has not been willing to do. Coercion under the Vienna Convention on the Law of Treaties means no more than the threat or use of physical force. It is of no operable significance, and one does no more than mention Hitler's coercion of the President of the rump Czech state in March 1939. Nonetheless, once one can rethink the grounds of international legal personality the possibilities of a discourse ethic can easily arise. As I have argued elsewhere, a social-realist perspective will go beyond the definition of the state in analytical terms (*elements of government, territory, population*), and offer a minimum of political sociology with respect to the collective, territorial-based elements that still dominate international society. It is not a matter of essentializing ideal entities, but simply a matter of realizing certain relative constancies in this society. Indeed, it is precisely the instability of these identities, their dynamic to expand and contract, interacting more usually negatively than positively with others which creates the whole drama within which international law operates. Ontological insecurities of states and nations determine the parameters of disputes about such issues as recognition of territorial title, rights of peoples claimed to secession, minority rights, attempts to suppress 'terrorism', etc.[46]

In this context each group, and indeed each individual, sees itself as a subject and the others as objects, while also being objectified by how others see us and how we see ourselves as trained by those in authority to see ourselves.

One should have to abandon the abstractions of statehood for the political sociology of democratic nations, as a framework of epistemological reference. So, for instance, the US is an historically situated, territorially-based people (subject), not a population (object) with inherited traditions, prejudices, strivings, and aspirations, which all contribute to the style and content of its behavior. The positive dimension of phenomenology is that one does not react to such an entity in terms of a reductionist ideology critique, which treats it as an object, but instead aims to provide a pathway to de-objectification, through an understanding of the self – here a collective self – embedded also in relations with one another. This may open up the possibility, in relations characterized by grave inequalities and coercive power, of disentangling the contradicting intentionalities of the collective entities in relations with one another.

Once this context is accepted, it is possible to give concrete shape to a discourse ethic in international legal relations, and who better to undertake this than Jürgen Habermas himself. He has put the question whether one can any longer think of the development of an international legal constitution in the light of the conduct of the US since 9/11 and does this particularly in terms of the unilateralist behavior of the country and the contradictions which this represents in terms of its traditions. He is realistic about what has to change if one is to take up again a path of constitutionalization. The whole argument is an exercise in contemporary history, while being as well a normative critique from his idealist perspective of uncoerced communication. In his study *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?* Habermas addresses directly the challenge of the Iraq invasion of March 2003. One super power which thinks itself strong enough to enforce its will sets itself above the basic international law norm on the prohibition of force, while, at the same time, the United Nations does not break up. This, for Habermas, is an ambiguous situation.[47] What is especially interesting in this context is the manner in which Habermas sees the crisis of international law as both a negative dialectic of the relations of the US with the rest of the world and as negative contradictions within American collective identity. This concretizes his critique of the violent character of the US's approach to international law. Habermas notes dramatically the diplomatic

silence over the future of international law; a rhetorical weakening of the legal concept of armed attack, the threat of the Carl Schmitt-style division of the world into *Grossraumordnungen* of various powers.[48]

While one might dream of a change of policy with a change of government, in fact what the practice suggests is a power that uses its military, technological, and economic superiority to create a geostrategically suitable world order in accordance with its religiously shaped concepts of good and evil. Habermas contrasts Kant's concept of impartially promulgated and applied norms that could have the effect of rationalizing political power, with the hegemonic unilateralism that takes decisions, not following established procedure, but through insisting on its own values. This latter is not an ethical alternative to international law but a typical imperial variant of international law.[49] Whether international law is understood as a state-centered system that expresses the multilateral relations of states or the hegemonic law of an imperial power that incorporates it into its national law, these understandings of the relation of law and power do not remain untouched by the normative self-understanding of the state actors. For this reason the relationship does not have a purely descriptive character. Following the Kantian model of the significance of a democratic constitution and the capacity to behave with a long-term view of its interests, such a state should respond in future to the growing power of other Great Powers not with pre-emptive strikes, but with a timely re-establishment of a political constitution of the state community.[50]

However, for the moment, that is clearly not the character of the US. President Bush, with a good conscience, enforces a new liberal world order, because he recognizes thereby, as a world standard, the spreading of American values. Replacing the law of the international community with the American ethos means that from then on what is called international law is imperial law.[51] At the same time, given the huge power asymmetries at present, whatever political decisions a single superpower makes are going to appear ambivalent. The conceptions of national interest and of global interest are bound to become mixed.[52] The September 2002 national security doctrine and the January 2003 State of the Union address denouncing the UN prohibition of force ('The course of this nation does not depend upon the decision of others') show a profound contempt for one of the most important achievements of mankind, a clear intention to replace the civilizing power of universalist legal proceedings with the determination to use military force to give an American ethos a claim to universality.[53]

This latter fact has to mean there is no prospect that international and intercultural dialogue can serve to correct any US misapprehensions or self-delusions. Habermas stresses the cognitive disasters that must accompany US partisan unilateralism. No matter how carefully it may proceed, the well meaning hegemon, taking decisions about self-defense, or humanitarian intervention, or the setting up of a tribunal, when it comes to weighing up all the relevant aspects of a decision to take, can never be sure whether it distinguishes its own national interest from the general interest. The inability is a question of the logic of practical discourse and not of goodwill. Each proposition coming from one side as to what is rational for all sides can only be put to the test when it is left open to a discursive procedure of opinion and will-formation. Egalitarian decisions depend upon ongoing argumentation, where they are inclusive and require the participants to take over mutually one another's perspectives. This is the cognitive sense of impartial decision-making. From this perspective, a unilateral proceeding, calling upon supposedly universal values of one's own political culture, is clearly ethically deficient. This is not helped if the superpower is a democracy, because its own citizens suffer the same cognitive limitations as their government. These citizens cannot pre-empt the interpretations, which the citizens of other political communities put on universal values and principles from their own local perspective and their own cultural context.[54]

IMPERIAL PERSONALITY AND A PHENOMENOLOGY OF BROKENNESS OF RELATIONSHIPS

A phenomenological grasp of the consequences of unilateral enforcement of supposedly universal liberal values of democracy and the rule of law stresses the inevitably solipsistic aspect of such behavior. In his study of the US invasion of Iraq Manuchehr Sanadjian offers to explain that the massively self-destructive pillage of all public institutions following the US-led invasion was the symbolic Iraqi way of rejecting liberation as a gift from outside. During Saddam Hussein's dictatorship Iraqis negotiated a space for themselves professionally through their engagement in such national institutions as schools, hospitals, museums, libraries, power stations, etc., which they gratuitously destroyed afterwards. This was their way of damning the status of liberated conferred upon them by their occupiers.[55] In his phenomenological analysis, the author shows how such a unilateral juridical exercise of power can only become the right of the ruler to

rule. 'By making the mediating institutions dysfunctional the Iraqis closed a major area for the total exchange between themselves and the Americans and the British . . . The distance from which the American and British forces watched the extravagant destruction of public functions was a reflection of their disengagement with the Iraqi people.'[56]

The use of extreme violence by the Americans and the British de-subjectivized the Iraqis as national agents, turning the relationship between the invaders and the occupied into one of asymmetrical power imbalance to which Iraqis responded with a non-discursive, disaffiliating use of force.[57] Not merely the self-destructive disposal of public property showed the Iraqi disengagement, but also 'the predominantly private reception of the remains of the victims of the former regime's violence obstructed the representation of these remains as the evidence of the crime committed by the state.'[58] The introduction of a devastating military power in the relations between nations, by making power irreversible, i.e. recognizing no right to oppose it, meant there could be no distinction between power and right. It would only be the creation of a political space that 'would have civilised the fear of the other by fostering a shared sense of community in which divisions and conflicts were confronted and recognised through efforts to eliminate them via recourse to the notion of the right of (wo)men to be equal.'[59]

The same phenomenological description determines the quality of military occupation and explains the violations of prisoners' rights. In Sanadjian's words, the 'disturbing liberty with which the detainees had become the object of their interrogators' sadistic gaze reflects the absence of politics outside of which the fear of the other will remain as uncivilised . . .'[60] The military occupation creates a gap from the Iraqi people too large for politics to bridge. What one sees, instead, is a neocolonial ethnicization – Iraqianization – of the Western occupation.[61] Indeed, predicting the narrowness of the list of charges that would be brought against Saddam Hussain when he was eventually brought to trial, Sanadjian describes the situation phenomenologically: 'The inability to verify – to objectify – the crimes committed by the former ruler was the symptom of the lack of political community that is sustained by a set of shared values on how to address the divisions and conflicts among the members of the community through recourse to a universal notion of rights.'[62]

Strikingly, the massive anti-war protest marches in mid-February 2003 were also a collective enunciation of disidentified subjects.

Without recourse to the narrative of a universal victim to encompass them all, these protestors 'rejected their position as the beneficiary in the policy of military intervention, whether to protect them from Iraqi threat or to uphold standards of humanitarian behaviour. This anti-political rejection was as closely associated with the patterns of militarisation as the fetishised liberty that had become the object of a forced, hierarchical gift.'[63] However, this separation from the political space is not as severe as the nihilistic drive to mutual annihilation, 'designed to make the self immortal through physical destruction of the other'.[64]

The form of the unilateralism needs to be further demarked as an essential part of understanding the so-called legal conviction of the Americans and the British. These remain oblivious of their transgression, because of their self-identification as agents of good. The fusion between expansion of a power base and universalization of ethical values also brings with it an expanding economy of global violence in which power is inevitably freeing itself from institutional constraints, meaning – concretely – that the Iraqis can see that their borders become redundant against an imperial power that recognizes no limits, and indeed their borders become projections of global disorder and paranoia.[65] This is a further consequence of the militaristic abolition of distance between political communities. In this context of militarized destruction of distance the role of democracy, rule of law, and human rights is completely problematic. Iraqis who become cosmopolitan are taking refuge from a humiliating experience of being a national. They deny any national agency by belonging to a more universal religious and ethnic community beyond national borders. Marxist theory, following Gramsci, realizes that to become internationalist, without being mediated through a national agency, is thereby to become chauvinist.[66] The specifically chauvinist character of this internationalism is that it excludes the other from a universal representation, which can only be national when it is heterogeneous. This is inevitable because they come into play on the Iraqi scene only after the population of Iraq has become disposable.[67] Its political space has been militarized. However, this is not only happening in Iraq. It is a global feature of contemporary capitalism that the state perpetuates its status as the giver of the gift of liberty, which is sustained as a fetish, through a hegemonic order 'in which the state subsumes the multiple, often incompatible interests operating in society . . . to buttress up a new global form of sovereignty in a 'shrinking world' in which the sovereignty of the state has become increasingly untenable.'[68]

One comes back again, full circle, to the nature of unilateralism. The guardians of power have been relieved of reliance on the opinion of the many as the power base in their own constituencies. Bush and Blair have a compelling truth that is platonically indifferent to the national constituency in the face, instead, of a paranoid global space. As Sananjian concludes this stage of his argument:

> a paranoid space characterised by unstable boundary between subject and object militates against the formation of politics as a domain of contested representations, where distance is maintained through representatives and the represented. The erosion of this distance is conducive to prophetic calls to restore the order by a variety of Truth-tellers.[69]

The combination of the neo-conservatives in the US and the cosmopolitans in Iraq 'purportedly seeks an order in which the individual is granted the status of citizenship beyond the limits imposed by the state . . . What their cosmopolitanism harbours is chauvinism, that is to say a homogeneous universality from which even the internal other is excluded.'[70]

Can an International Order of Human Rights Banish Alienation? Ways to an International Law of Diplomacy as Tact in the Face of Perplexity

The restoration of political space has to come from a dissipation of the frenzy of chauvinist cosmopolitan ideology of the rule of law and democracy in favor of a more agnostic return to mutual distancing in international relations. This in turn is possible if one recognizes the not-to-be removed character of alienation and uncertainty in human relations. The difficulty appreciated so clearly by postmodernist theorists is that international disorder and anarchy – the problem for the very existence of international law – has been *constructed*, since the time of the celebrated but irrelevant Treaty of Westphalia, around the transfer or projection of what Der Derian has called self-alienation from within the state community, nation, or whatever, onto the international plane.[71] The very problem international law used to face was how or why collective entities in international society construct themselves against one another. This is what postmodern international relations theory has so effectively explored. Inquiry into the nature of the *domestic/foreign* binary opposition is the starting point of *Postmodern Readings of World Politics*.[72]

Arguably there has been a significant modification of this paradigm, recognized by some followers of Michel Foucault. One contribution of Foucault, which has recently been developed by Hardt and Negri in *Empire*,[73] has been to dissolve the sovereign Hobbesean power, which had projected alienation abroad, into a struggle of 'all against all,' as a seamless web across the whole of humanity. Nijman follows Foucault's argument that if power is not sovereign, who then participate in the struggle for it? She presents an extremely lucid exposition of Foucault's answer, taken from *The Order of Things*.[74] Nijman notes how, for Foucault, the struggle for power is supposed to be a struggle of all against all. There are no immediately given subjects of the struggle, e.g. the proletariat on the one hand and the bourgeoisie on the other. She quotes Foucault: 'We all fight each other. And there is always *within* each of us something that fights something else.' So, ultimately, the individual itself is a fragmented unit composed of 'sub-individuals,' which is radically different from the coherent subject envisaged by modernism. She concludes with a very clear grasp of the implications of what Foucault is saying: 'The bottom line is thus that Foucault considered the human body, "the locus of a dissociated Self", which adopts the illusion of a substantial unity. And not only this, but we are also all destined to fight each other and ourselves and so, without the constituent subject, the world is ready to come apart.'[75]

The seminal, if under-appreciated, international relations critique that builds on Foucault's genealogy of knowledge is Der Derian's work. After mentioning Nietzsche and Foucault, he continues: 'Infused by their work, a genealogy of diplomacy is, in short, an interpretation of how the power of diplomacy, in the absence of sovereign power, constituted and was sustained by a discursive practice, the *diplomatic culture*.'[76] Der Derian devotes a whole chapter to the theme of alienation, taking as his starting point Nietzsche's axiom 'for us the law "each is furthest from himself" applies to all eternity – we are not "men of knowledge" with respect to ourselves.'[77]

Der Derian sets out a standard psychiatric definition of alienation as 'disturbance of the whole personality, e.g. failure of identity formation, adoption of false roles under external pressure, alienation from one's true self or from one's personal or cultural background.' At the same time he note the *Oxford English Dictionary* introduces the interpersonal dimension of alienation, as: 'To convert into an alien or stranger . . . to turn away in feelings or affection, to make averse or hostile, or unwelcome.'[78] Alienation is a word that designates separation, whether

from the self or from the other, and a phenomenology of the alienation that undoubtedly exists among states is the true and ultimate starting point of a study of international legal personality. The question is whether there is a way to mediate this alienation. Der Derian argues that such has been the function of diplomacy, recognizing and leaving unresolved the permanency of alienation as a diffuse human experience. Anti-diplomacy is described by Der Derian as any ideology, whether the French Revolution, fascism, Bolshevism (or, for that matter, contemporary liberal market economy) that claims to be able to put in place a perfect philosophy that will remove rather than merely mediate the phenomenon of alienation, not recognizing it as an ineradicable feature of the human condition.[79]

It is an anti-diplomatic world in which we find ourselves at present, with the Western, self-styled liberal democracies waging an at times violent struggle to impose their vision of the world on the whole of humanity, in the precise sense that they expect thereby to banish the sense of alienation completely from human experience. Der Derian, writing in 1987, provides an accurate description of the consequences of the desire to make human rights the ultimate goal of international law and society. The whole contemporary edifice of international law, the trend towards a so-called global constitutionalization, the primacy of individual human rights, etc. is based upon a demonization of collective and community life in favor of an absolutization of the autonomy of the individual person,[80] whose sacral character lies precisely in the fact that it remains completely immune from scrutiny. This is how international law itself *misunderstands itself and thereby remains alienated from itself* at present.

Der Derian tries explicitly to avoid the religious origins of the language of alienation in the idea of man's separation from God.[81] I think the main strength of his work is diagnostic or heuristic. The following remarks accurately describe the present crisis of an international society confronted by an anti-diplomacy of liberal democracy (which I equate with his term 'revolutionary' in the quotation which follows) that hopes to remove the phenomenon of alienation from the rest of humanity, without recognizing and negotiating its presence within itself:

> the systemic hermeneutic of alienation . . . might help explain the link between *intra* and *inter*-estrangement, that is the dynamic of how the conduct of diplomacy under revolutionary regimes shifts from the mediation of estranged states to the mediation of the universal alienation of humanity . . .[82]

Instead, one needs to recover and guard a measure of, as it were, healthy estrangement to reduce the tension of the present crisis. IPL must somehow be reconceived to reflect an acceptable level of mutual distance and unknowing. This is where the concept must be systematically related to the contemporary philosophical debates about the nature and consequences of mutual recognition and misrecognition.

These debates themselves only make sense in the context of a material definition of the personality of the state as an historical cultural community, the descriptive analysis of which has also to be evaluative. The most helpful categorizations here are from Barry Buzan, in terms of mature and immature political societies, embedded in state structures. The definition and application of international legal rules can be understood, across the board in terms of a phenomenology, to a greater or lesser extent, of maturity and immaturity.[83] At the same time his definition of (im)maturity extends to relations among states, for instance India and Pakistan, or the US and the Soviet Union during the Cold War. Clusters of relationships cover a mixture of (im)mature relations. This concrete concept of alienation is less abstract than Der Derian's. How far two states define themselves against one another depends on the circumstances. The state practice needs to be illustrated more fully and shown to be related to clusters of recognizable international legal rules. At the same time, such a descriptive, analytical framework of essentially sociocultural relations needs to be complemented by a normative phenomenology of desirable degrees of density of relations among states. Such an ontology of the desirable limits of community among states[84] provides the final picture of how far it is possible to develop and apply legal rules among states.

Buzan identifies precisely the problem of defining ideas of 'threat' and 'security' in a manner which is decisive for international law. The international law concept of threat of force or use of force is purely directed against the physical territory and 'physical' institutions of the state, in particular its government officials. This is to ignore the vital element of the character of the state, itself dependent upon distinctions between the idea of the state, the institutions of the state, and its physical base.[85] Whether a state such as the US feels 'threatened,' e.g. by the Soviet Union, in the time of the Cold War (1982) will depend crucially upon the part played by anti-communism in the construction of the idea of the US. This type of inherent instability continues to be built into many of the world's 'troublespots,' particular Israel/Palestine and India/Pakistan. It is difficult to see how 'threats' to security can be eliminated in these areas without a fundamental

change in the idea, and, at the same time, the institutions and physical base of these states. The viability of legal rules based on reciprocity, such as mutual recognition, of equality and non-intervention is put into question in these cases.

Equally decisive are internal weaknesses in the idea of the state as such. When the population has no common interests, purposes, and ideas the society or population of the state will be liable to internal divisions which will automatically lead other states to treat the physical base of that state as a legal vacuum, making it prey to various levels of intervention. A mature anarchy in the relations of states supposes that the states are themselves mature as distinct from immature. By mature Buzan means 'well ordered and stable within themselves.'[86] Only mature states can support strong common norms for the system as a whole. The idea of international law expresses this mature anarchy, mutual recognition of sovereign equality, the right of national self-determination, the sanctity of territorial boundaries, the resolution to settle disputes without recourse to force, and, most importantly, refraining from interfering in the domestic affairs of other equal states. Any state that does not reach the necessary level of maturity automatically falls out of this net of reciprocity, and the vacuum of physical space that it represents is not filled by international law. So the international lawyer has to make his way through a web of ideas, expressing political culture, more or less unevenly within and between states, and it is this alone that supports a law based upon reciprocity.

Yet the inherent vagueness of this project seems incompatible with the idea of law itself. How can political society, especially at the international level, rest exclusively upon an unraveling of ideas? Where is the place for physical power, interests, and the anonymity of vast spaces? Plessner provides a way to complement the apparent romanticism of Buzan's 'mature anarchy.' This latter concept is, surprisingly, also formal in the sense that it does not do more than register a certain balance or stability achieved at a national level, without precisely pinpointing how this has been achieved. Plessner's perspective is especially wary of a tradition of German political romanticism, which believes that political community can be based upon a union of convictions of its members.[87] He takes up a theme similar to Der Derian's, that the function of diplomacy is to negotiate and mediate human alienation. For Plessner the supreme form of diplomacy is law, and its function is also to negotiate the difference between the conviction and sincerity of the private sphere and the inevitable indifference and indeterminacy of the public sphere,

reversing the value priority frequently accorded to community (*Gemeinschaft*) over society (*Gesellschaft*) in German society. 'Each sphere has its specific authorities for making decisions: community governs itself according to insights and love, society according to game-legitimated struggle and tact.'[88]

He defines the law in terms of the need to negotiate the two:

> The state is the systematization of the public sphere in the service of the community and the epitome of measures protecting the community in the service of the public sphere. . .The method of this integration between the demand for lack of restraint and the demand for restraint, both of which are supported equally by human nature, is *law (Recht)*. In this idea are united what is proper, which corresponds to a natural integration through conviction, the voice of insight and heart, and what is legally justified (a balancing out [*Ausgewogen*]), which is equivalent to an agreement arising from different directions of forces as a conclusive resulting position . . .[89]

What Der Derian would designate as alienation, Plessner characterizes as the unavoidability of force, of being bound inescapably to the laws of reserve, cunning, and insincerity, however much humanity may yearn for an ultimate transcendence of force through insight and sympathy.[90]

So, Plessner recognizes that force is part of the fate or destiny latent in the distribution of power, while at the same time stability and security require a diplomacy that does not humiliate a person by demonstrating publicly that his conviction is of no consequence. Without a threat, even if latent, no one will treat reaching an agreement as necessary, while a use of force that goes beyond cunning, tact, and shrewdness, to lies, extortion, and means which cut off the individual from all use of his freedom, fails to achieve a balance between the public sphere, where conviction has no place, and the private sphere, where it is dominant.[91]

At any rate a Habermas-style dialogue of unrestrained communication to achieve Kantian goals, whereby each individual must be treated as an end and not a means, to achieve a world republic based upon ideals of democracy, the rule of law and human rights, is precisely the kind of romantic nonsense that ignores the political nature of the human condition. Plessner comes round to a very much refined idea of state necessity or reason of state in terms of the inevitably decisionist element in any application of law – quite the contrary to Habermas:

> Praxis means coping with things in the medium of ephemeral approximations and on the basis of an experience that can not be made

> methodologically unambiguous, of an experience of tact calibrated individually. Practical competence refers to an essentially never risk-free endeavour that must have a certain amount of luck if it should be successful. Therefore a congress of politicians cannot achieve unanimity through reciprocal convictions as the principle releasing their initiative even if wanted- not only because it is composed of unrealised functionaries, that is, because it does not contain persuadable beings who are open *in principle*, to insight, but also because the object of the judgment and entire conduct of such beings is practical. As Bismarck said: 'There arises in every congress, when the discussion of a theme must come to an end, the necessity to play heads or tails to decide the outcome – so necessary is it that there should be someone who finally says: 'It has to be this way!' Already this element of risk implicit in decisions of a public nature suffices in order to guide action according to maxims of greater security and not according to principles of the trust in reason.'[92]

It is probably not necessary to elaborate too much on anthropological differences between Plessner and Der Derian because they do not affect conclusions about the role of law and diplomacy. However, some mention may be made of the theses that Plessner develops to favor a law of distance and tact. Plessner's starting point is that the human soul 'does not support judgements regarding its nature, but defends itself against every determination and formulation of its individual being. . . . The dual character of psychological being pushes towards and, at the same time, pushes away from being fixed and determined. We want ourselves to be seen and to have been seen as we are; and we want just as much to veil ourselves and remain unknown.'[93] A consciousness that strives, from within the depths of its unconscious, to mobilize and organise into a unified position requires an unrestrained honesty before itself.[94] To which Plessner adds decisively: 'Of what use is, however, an invisible obedience within one's own inner being [*Innern*] when the appearance of the conforming deeds can be accorded a false meaning?'[95] Against the ironically destructive perspective of the indeterminate number of persons unknown to each other, who, with limited opportunities, can only establish acquaintance, the human must mask himself with a form. Offensive indifference and coldness must become an enobled reserve. 'The person generalizes himself and objectifies himself through a mask behind which he becomes invisible up to a point without fully disappearing as a person.'[96] While the objective still remains, to ensure respect for one's, hopefully, surging capacities,[97] 'the clamor for uncorsetted dress deserves to find echo only with

extremely good figures.'[98] The goal is to achieve validation of the self through a reciprocal respect at the social level, which rescues one from the despair of one's interiority.[99] However, finally, Plessner comes down against the idea of alienation having to be eliminated, at least at the social level. Civilization requires the play of ceremony and prestige, the 'unrealization of the natural person as the unrealization of some kind of meaning.'[100] Radical moralists always adopt an accusatory tone, ridiculing the masking of public life. 'Their value rigorism is calculated for seriousness and relentlessness.'[101] However, Plessner rejects the putative estrangement of the objective body and the spirit/soul: 'dualism, the core argument of social-revolutionary radicalism, is rejected as not true.'[102]

Once again Plessner sets out very clearly what this means for the relationship between law, ideal values, and effectiveness. The experience of law (*Rechtsleben*) is central to social life. 'Individuals conduct themselves in accordance with their inner judgements and intuitions of fairness and see themselves betrayed by jurisprudence and the practice of law without thereby understanding that law as an objective order must satisfy two requirements: the requirement of legality (correctness); and the requirement of manageability, feasibility and general validity.'[103] There is a twofold fracture, between the norm and the situation and between the private and the official person. So all agreements eventually concluded reflect the public sphere as a place where unattached persons meet through the distance of value, not a freedom from value but a constant and insoluble tension between norm and life.[104] The balance between what different opinions regard as human dignity and 'factual necessities' is not possible to harmonize according to a natural evaluative standard. 'The art of transaction or diplomacy enters precisely here to reach conditions for an agreement that could be as useful, decent and advantageous as possible.'[105]

So all idea of law must rest upon an anthropology of the person, and that person must be recognized as opaque. This is not to say one is offering yet another version of a liberal ideology, of freedom, the rule of law and democracy, etc., which, sooner or later, has to be enforced against alternative ideologies, supposedly authoritarian or totalitarian. Rather, this idea of law is an epistemology of human experience, a call for inter-disciplinarity in the application of law. Law is not merely context-dependent. It is always directed beyond itself. It has to give shape and to manage what Plesser would call legal tact – the more or less (im)mature anarchy of more or less (im)mature societies. The limits of the tasks are clearly set by Der Derian and

Plessner. While there is so much to be learned, there is also so much that cannot be learned, that remains opaque, *where mistakes and misjudgments will always be made*. Each international lawyer has his own contribution to make provided he is willing to engage in such an adventure of discovery and misunderstanding. Tact in the face of perplexity has to take the place of fear in the face of the unknown and apparently threatening.

Notes

1 This has been the argument of chapters 4–6.
2 R. Tuck, *The Rights of War and Peace, Political Thought and the International Order from Grotius to Kant*, 2001.
3 Paul Ricoeur, *Parcours de la reconnaissance* (2004) 241.
4 Ibid., 242.
5 Ibid., 245.
6 Ibid., 246.
7 Ibid., 249–51.
8 Ibid., 251.
9 Ibid., 255.
10 Ibid., 258.
11 Ibid., 260–3.
12 Ibid., 267–8.
13 Ibid., 274.
14 Ibid., 288–9.
15 Ibid., 298.
16 Ibid., 292–3.
17 Ibid., 307.
18 Ibid., 315–18.
19 Molly Mann, 'Ricoeur's Dialectic of Solicitous Giving and Receiving: Instruction, Recognition and Justice,' 20–1: Paper Presented at the Colloquium, 'Thinking the Present,' University of California at Berkeley, May 2005, http://www.criticalsense.berkeley.edu/mann.pdf.
20 Ibid.
21 In *Paul Ricoeur and Contemporary Moral Thought*, ed. John Wall, (1992); Fred Dallmayr, 'Ethics and Public Life,' in ibid., 221.
22 Mann, Ricoeur's Dialectic, 23, quoting Riceour, *The Just* (2000) 37.
23 Ibid., also Ricoeur, ibid., 56.
24 Ibid., 25.
25 Ibid., 26.
26 Paul Keal, *European Conquest and the Rights of Indigenous Peoples* (2003), 56 ff.
27 Anthony Pagden, *European Encounters with the New World* (1994).

28 Quoted by Keal, *European Conquest*, 62 from Pagden, *European Encounters*, 36.
29 Gong, quoting Lewis, in *The Standard of "Civilisation" in International Society* (1984) 108.
30 A. L. Macfie, *Orientalism, A Reader* (2000), 4.
31 Ibid.
32 Ibid., 3 and 5.
33 Ibid., item 24, 217–38.
34 Ibid., 225.
35 Ibid., 230.
36 Ibid., 221.
37 Second edition (1992).
38 Ibid., 312–435, Chapter 5, 'The Hermeneutic Motion'.
39 Ibid., 213–313.
40 Ibid., 314.
41 Ibid., 315.
42 Ibid., 315.
43 Ibid., 316.
44 Ibid., 317.
45 Ibid., 318.
46 A. Carty, 'Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law' 14, *EJIL* (2003) 817, at 820.
47 In Jürgen Habermas, *Der gespaltene Westen* (2004) 113 at 146.
48 Ibid.
49 Ibid., 147.
50 Ibid., 148.
51 Ibid., 180.
52 Ibid., 180–1.
53 Ibid., 181–2.
54 Ibid., 183–4.
55 Manuchehr Sanadjian, 'Fetishised Liberty, the Fear of the Other and the Global Juridical Rule in Iraq,' *Social Identities* 10 (2004) 665 at 666.
56 Ibid., 666.
57 Ibid., 668.
58 Ibid., 670.
59 Ibid., 671.
60 Ibid., 673.
61 Ibid., 673–4.
62 Ibid., 675.
63 Ibid., 677–8.
64 Ibid., 679.
65 Ibid., 678–9.

66 Ibid., 681.
67 Ibid., 682.
68 Ibid., 682.
69 Ibid., 683.
70 Ibid., 684.
71 See, generally, James Der Derian, *On Diplomacy, A Genealogy of Western Estrangement* (1987).
72 The sub-title of the volume edited by James Der Derian and Michael J. Shapiro, *International/Intertextual Relations* (1989). See especially the chapters by Richard and Ashley, 'Living on Borderlines: Man, Poststructuralism and War,' and William E. Connolly, 'Identity and Difference in Global Politics.'
73 M. Hardt and A. Negri, *Empire* (2000).
74 M. Foucault, *The Order of Things, An Archeology of the Human Sciences* (1970).
75 J. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (2004) 377–8.
76 *On Diplomacy*, 4.
77 Quoted ibid., 8.
78 Ibid., both quotations at 13.
79 *On Diplomacy*. See chapters 7 and 8, on Anti-diplomacy and Neo-diplomacy.
80 Nijman, *The Concept of International Legal Personality*, esp. chapter 3.
81 Ibid., 15.
82 Ibid., 26.
83 Barry Buzan, *People, States and Fear* (1982).
84 Following Helmut Plessner's *The Limits of Community, A Critique of Social Radicalism* trans and introduction, Andrew Wallace (1999).
85 Buzan, *Peoples, States and Fear*, esp. chapters 2 and 4.
86 Ibid., 96–8.
87 Plessner, *The Limits of Community*, the translator's introduction, Wallace, esp. 9–16.
88 Ibid., 174–5.
89 Ibid., 174; italics in the original.
90 Ibid., 193.
91 Ibid., 156.
92 Ibid., 177; italics in the original.
93 Ibid., 109.
94 Ibid., 111.
95 Ibid., 129.
96 Ibid., 131–3, quotation at 133.
97 Ibid., 139.
98 Ibid., 143.
99 Ibid., 144.

100 Ibid., 146.
101 Ibid., 146.
102 Ibid., 147.
103 Ibid., 150.
104 Ibid., 151.
105 Ibid., 152.

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